

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 IN SEATTLE

4 UNITED STATES OF AMERICA, et al,)
5)
6 Plaintiffs,) No. C70-9213
7) Subproceeding 01-1
8 v.)
9)
10 STATE OF WASHINGTON, et al.,) FINAL
11)
12 Defendants.)
13)
14)

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE RICARDO S. MARTINEZ

17 October 23, 2009

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1 THE COURT: Welcome back, everybody. I hope you had a
2 good two days while we were gone. I think we have a couple of
3 housekeeping matters we want to take up.

4 MS. FOSTER: Good morning, your Honor. This is Alix
5 Foster, for the record.

6 Your Honor, I'd like to withdraw at this time a number of the
7 plaintiffs' proposed exhibits, and I will read them slowly for
8 the court clerk as well as for the court reporter. The
9 plaintiffs would like to now withdraw AT-13, AT-29, AT-74, AT-77,
10 AT-98, AT-99, AT-106, AT-107, AT-115, AT-116, AT-122, AT-123,
11 AT-124, AT-126, AT-127, AT-134, AT-135, AT-136, AT-139, AT-141,
12 AT-142, AT-173, AT-175, AT-179, AT-185, AT-188, AT-191, AT-195,
13 AT-198, AT-200, AT-201, AT-203, AT-204, AT-205, AT-208, AT-209,
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17 AT-268, AT-269, AT-271, AT-274, AT-275, AT-277, AT-280, AT-283,
18 AT-284, AT-293, AT-294, AT-295, AT-296, AT-297, AT-298, AT-299,
19 AT-300, AT-303, AT-305, AT-307, AT-308, AT-316, AT-318, AT-320,
20 AT-321, AT-329.

21 I'd also like to -- apparently the admissibility has been
22 stipulated with regard to AT-327 and AT-328, and I'd like to move
23 to admit those at this time.

24 And then finally, there were two plaintiffs' exhibits that on
25 the first day, in our desire to move quickly in terms of the

1 admissions, we mistakenly admitted two exhibits. One of them is
2 AT-125 and the other is AT-317. And I would like to move to
3 withdraw them because they were mistakenly admitted.

4 THE COURT: All right. Thank you, Counsel.

5 Let me hear from Mr. Tomisser. First of all, let's start
6 from the last point and go backwards. Any objection to
7 withdrawing admitted Exhibits AT-125 and 317?

8 MR. TOMISSER: We need to figure out which those are.
9 We didn't have a notice to withdraw. I'd like to state, you
10 know, as a general matter here, this extensive list of withdrawn
11 exhibits, which we'll obviously have to look through and see
12 which ones are being referred to, but these pieces of evidence
13 were stipulated by the party and ruled admissible by the court.

14 At that point, the evidence is equally available to everyone,
15 and so I don't know that we're necessarily going to agree to now
16 the denial of that evidence lightly after the witness who would
17 have been here to lay the foundation for it is gone, and we would
18 have no opportunity to then put in a piece of evidence that we
19 had assumed at the time the witness was here was in because it
20 had been ruled admissible by the Court. But we will certainly
21 review this list, and perhaps we won't care about the
22 withdrawals.

23 But potentially -- we're certainly not going to agree to the
24 withdrawal of evidence with no witness available to put it back
25 in.

1 THE COURT: All right. Hang on a second. Let me see if
2 I can figure out where we are here.

3 Ms. Foster, my understanding was that the very first list you
4 read that makes my notes here look like the DaVinci Code, the
5 very first list that you read, none of those have been admitted
6 so far.

7 MS. FOSTER: That is correct.

8 THE COURT: Were any of those that you read in that
9 entire list stipulated for admission by both sides?

10 MS. FOSTER: I will have to review my list, your Honor.
11 I think there was a large majority that were not stipulated to,
12 but I will have to verify that.

13 THE COURT: All right. So then what we need is a list
14 of the ones that were stipulated by both sides, because the State
15 is correct, they have an absolute right to have relied on the
16 fact that these might have been admitted. So we can deal with
17 that later.

18 But regarding 125, 317, Mr. Tomisser?

19 MR. TOMISSER: I'm trying to find what they are, your
20 Honor.

21 MS. FOSTER: Your Honor, I had advised the State early
22 last week, shortly after they had been admitted, that they were
23 admitted improper -- that we had mistakenly moved to admit them.
24 So the State was on notice for at least a week prior to the
25 beginning of their -- certainly prior to the beginning of their

1 own case and before the end of our case that we wished to
2 withdraw those two exhibits, AT-125 and AT-317.

3 MR. TOMISSER: Your Honor, we were not notified about
4 the 317. We have no objection to the tribe's request on 317.

5 THE COURT: So you have no objection to 317?

6 MR. TOMISSER: Right.

7 THE COURT: 317 will be withdrawn, Madam Clerk. It is
8 not admitted.

9 MS. FOSTER: We certainly notified them of AT-125. They
10 should not have relied upon the fact that they were going to be
11 admitted. They knew we were going to move to withdraw, or
12 advised the Court that there had been a mistake.

13 THE COURT: All right. Hang on. AT-125 is a risk-based
14 estimate self-modeling, according to my pretrial order, and the
15 admission had been stipulated to by both sides.

16 MR. TOMISSER: We would like to have that one in.

17 THE COURT: So you would like that one to remain?

18 MR. TOMISSER: Yes.

19 THE COURT: All right. So 125 will then remain in
20 evidence.

21 MS. FOSTER: Your Honor, that particular exhibit had
22 everything to do with a State's witness, David Smelser, who the
23 Court then subsequently ordered in the motion in limine that his
24 testimony would not be permitted. And so the tribes -- because
25 we did not know at the time that we drafted our exhibit list, the

1 tribes included a number of documents that we might have used
2 with regard to that testimony.

3 That testimony is no longer before the Court, and we don't
4 believe that there's a need for that evidence to be in. Plus we
5 had advised the Court last week that we were -- that it had been
6 mistakenly admitted. But the tribes really had no choice but to
7 list a number of documents that it might have relied upon had
8 that testimony been before the Court. But once that testimony
9 was no longer before the Court, I think that the tribes certainly
10 have the right to withdraw that evidence.

11 THE COURT: I understand the point you're making,
12 Counsel. At this point in time, we'll leave it in. Let me take
13 a look at it specifically. As always, I can sort this out later.
14 It may be easier.

15 All right. Step two, she asked for admission of AT-327 and
16 328. Any objection to those two?

17 MR. TOMISSER: No objection, your Honor.

18 THE COURT: Madam Clerk, AT-327, AT-328 are now
19 admitted.

20 Mr. Tomisser, we can wait on the first step. There was a
21 long list of ones she read off. Let me know sometime later today
22 if you have any specific ones that you wish to discuss. Since
23 they have not been admitted, I think they do have probably a
24 pretty good right to withdraw them. We can talk about any
25 specific ones later on. All right.

1 MR. TOMISSER: Very well. Thank you.

2 THE COURT: Counsel, Ms. Hanson was on the stand when we
3 recessed. And I believe, Mr. Shaftel, you were still on direct,
4 I think.

5 MR. SHAFTEL: Yes, your Honor. As long as we're on
6 exhibits, actually, we've cleared up a number of issues on
7 exhibits with regard to Ms. Hanson's testimony. The following
8 exhibits, we've reached agreement on admission: W-153, W-156,
9 178-B, 179-B, 171-B, 193, 192, 170-B, and 152-A. So I'd like to
10 offer those exhibits into evidence.

11 THE COURT: Mr. Stay, good morning.

12 MR. STAY: Good morning.

13 THE COURT: Any objection to those that Mr. Shaftel read
14 off?

15 MR. STAY: No.

16 THE COURT: Madam Clerk, all those will be admitted as
17 well.

18 MR. SHAFTEL: I believe I neglected to offer into
19 evidence, although we have stipulation, on all the exhibits
20 attached to Ms. Hanson's declaration. Those would be W-093-A
21 through T. I'd like to offer those into evidence.

22 MR. STAY: I think they're in, your Honor.

23 THE COURT: Every one of those is in. 093-M was denied.
24 The rest of them are in.

25 MR. SHAFTEL: Okay. Thank you.

1 The outstanding exhibit that remains is Ms. Hanson's
2 declaration. We had an outstanding objection on two parts of
3 that declaration on Tuesday. We've reached agreement on one
4 part. Those are Paragraphs 46 through 48. There is a previous
5 objection to those, and I believe that objection has been
6 withdrawn.

7 MR. STAY: That is correct, your Honor.

8 THE COURT: All right. Thank you. 46 through 48.
9 That only leaves the 305-A you're still objecting to,
10 Mr. Stay?

11 MR. STAY: I want to ask Ms. Hanson some questions on
12 that, but -- in fact, no. I'll withdraw that objection and I'll
13 just ask my questions.

14 THE COURT: All right. So W-093 is also admitted.

15 All right, Counsel. Thank you very much. I've caught up on
16 the exhibits.

17 Mr. Shaftel, is there anything further on direct for her?

18 MR. SHAFTEL: Just a couple of questions, your Honor, if
19 I may.

20 (Continued Direct Examination)

21 By Mr. Shaftel:

22 Q Ms. Hanson, on Ms. Walter's direct testimony, Ms. Walter
23 represented the Department of Transportation did not fix a
24 barrier on the Renton nickel project - I believe it was Barrier
25 66 - despite the fact that she understood that there had been

1 work performed on that culvert.

2 Could you explain the circumstances surrounding that issue?

3 A On the I-405 Renton nickel project, we did have a culvert
4 along the SR 167 portion of the project. We identified it as
5 Culvert 66. We did, due to the roadway project, need to extend
6 that culvert, I think by about two feet. That culvert is one
7 that is parallel to another culvert that is located south on
8 SR 167, which is Culvert 65.

9 Culvert 65 carries the main flow of the tributary to Panther
10 Creek, and Culvert 66 only carries flow when there's an overflow
11 event, essentially, so it's not the main culvert which carries
12 the flow of that tributary. And so when we extended that culvert
13 because it was not the main culvert carrying the flow of that
14 tributary, we did not implement the exception to provide
15 mitigation in lieu of fixing that barrier. We did provide
16 mitigation for the direct construction impacts of extending it by
17 two feet.

18 In addition, at that time we knew that the upcoming phase of
19 work on I-405 was going to be looking at a larger watershed
20 concept for mitigation. And as part of the proposal at that
21 time, we were considering plugging Culvert 66 to direct flow
22 north to a culvert located north along 167, which carried the
23 main Panther Creek underneath 167. And so we knew that when that
24 future project became funded, the proposal that we would be
25 looking to go forward with would be plugging that culvert, 66, as

1 well as Culvert 65 to direct flow north.

2 And that proposal -- a portion of that is what we're now
3 implementing through part of our discussions with the Muckleshoot
4 Tribe for the mitigation on the work that we're doing in lieu of
5 doing a fish replacement structure at Thunder Hills Creek.

6 Q The names Kerry Ruth and Steve Shipe have come up a couple of
7 times throughout both Ms. Walter's testimony and your testimony.

8 Can you identify who are Kerry Ruth and Steve Shipe?

9 A Kerry Ruth is the Northwest Region environmental manager, so
10 she is my counterpart at Northwest Region. Steve Shipe works for
11 Kerry Ruth. He is the Northwest Region -- I believe his title is
12 tribal coordinator and business manager.

13 Q So are these the primary contacts for the Muckleshoot Indian
14 Tribe?

15 A That's my understanding, yes.

16 Q From the Northwest Region?

17 A Yes.

18 Q Sorry?

19 A Correct.

20 Q How can the cost of fixing barriers within the scope of a
21 highway improvement project that the DOT would not otherwise be
22 working on impact the ability to obtain funding for that project?

23 MR. STAY: Object, your Honor. I don't believe this
24 witness has the expertise to address that question. No
25 foundation has been laid that she is in fact a budget person who

1 addresses costs in their development.

2 THE COURT: We need more foundation, Mr. Shaftel.

3 By Mr. Shaftel:

4 Q Ms. Hanson, do you have familiarity with how the budget gets
5 developed for highway improvement projects in your region?

6 A I participate in the development of the environmental
7 portions of budget as well as over -- and previously in my
8 experience, I've been directly responsible for overseeing the
9 environmental portions of the project budget.

10 Q And do you sit in on meetings where the creation of the
11 budget for the projects are discussed?

12 A I participate in meetings where we talk about the overall
13 costs for the projects. And we have opportunities called cost
14 evaluation -- cost estimate validation process, where we look at
15 the cost on the projects, look at the risk and opportunity to the
16 overall project budget, do updates on the overall project
17 budgets, as well as participating in putting together estimates
18 for the environmental portions of project budgets, which include
19 the environmental documentation for NEPA, SEPA, the permitting
20 work, the mitigation plan, development, as well as participating
21 in the meetings.

22 I still in my role today review scopes of work for the
23 majority of that work that's done by consultants for our
24 projects, as well as in some cases participate in the
25 negotiations on those scopes of work.

1 Q And with those items that you just talked about, would they
2 include the costs -- the potential costs of including fish
3 passage barriers within the scope of the overall project?

4 A Yes. In order to implement a fish passage barrier
5 replacement as a portion of a highway improvement project, you
6 would have to do a couple of things up front of actually the
7 construction project.

8 In your NEPA or SEPA environmental documentation, you would
9 have to clear doing the fish replacement project. You would have
10 to obtain the permits to do that work. And in order to obtain
11 the permits for the project, you would have to develop the stream
12 and the wetland mitigation.

13 For the development of the stream and the wetland mitigation,
14 you develop actual stream and wetland mitigation plans which show
15 where you're going to do your mitigation, how you're going to
16 implement it, what your performance measures are, what your
17 monitoring requirements are, as well as where that mitigation is
18 going to occur. So for some of our projects, we have been able
19 to mitigate within our own right-of-way.

20 For some of our other projects, specifically within urban
21 areas, we may not have the ability to do so within the
22 right-of-way, and so we look for opportunities to do so outside
23 of right-of-way. In some of those cases, we may need to purchase
24 right-of-way. Other opportunities, we may be able to work with
25 local jurisdictions if they have a need for -- if they have

1 excess property and we have a need. We've found some good
2 partnerships that way.

3 The development of the permits, the mitigation plans, all of
4 that is up front prior to construction so that when the project
5 goes to construction, the actual culvert replacement can be
6 implemented as part of that project. Those types of up-front
7 costs are all things that happen before the contract goes out to
8 ad. And it's a DOT requirement that the permits are obtained,
9 the environmental clearance is in hand before the project goes
10 out to ad.

11 Q So these are all additional costs in addition to the actual
12 costs of the barrier itself and the work associated with the
13 barrier?

14 MR. STAY: Your Honor, I object. I don't think that's a
15 fair characterization of the testimony. She wasn't talking about
16 those added costs. Those are things that are involved in the
17 NEPA process.

18 THE COURT: The objection to the form of the question is
19 sustained.

20 By Mr. Shaftel:

21 Q How would you describe the -- are there costs associated with
22 all the things, these upfront environmental steps that you just
23 talked about?

24 A Yes, there are. And depending upon the project and the other
25 activities that are occurring, if you had a roadway project where

1 the only in-water work that was occurring was related to the
2 culvert replacement, then the stream mitigation that you were
3 developing for that project would be specifically related to that
4 culvert replacement project.

5 Other projects, that cost may not be solely attributed to
6 culvert work, if you're doing widening and you're going into the
7 stream and you're not doing culvert work; the same with a portion
8 of the permits and the mitigation plan development, our costs
9 that are associated with that work prior to the construction
10 cost.

11 Q And so you mentioned these costs being incurred before the
12 bidding -- the bid goes out. Are you saying that these are
13 separate costs that wouldn't be included in the bid that goes out
14 on the contract?

15 A Correct. Usually these --

16 MR. STAY: Objection, your Honor. We don't know that
17 this witness is involved with the bidding of these projects. I'm
18 getting the impression that she sits in meetings where these
19 things may be discussed, but there's no evidence or foundation
20 that she's responsible for anything involving the budget process.

21 THE COURT: The objection's sustained.

22 By Mr. Shaftel:

23 Q Are you familiar with what goes into a bid on the highway
24 improvement projects that you work on?

25 A How the format of the bid actually looks? I am not.

1 Q Are you familiar with whether or not those costs -- those
2 upfront costs that you just talked about would be the types of
3 things that would go into a bid?

4 A I am.

5 Q And how so?

6 A The work that I described of completing the NEPA/SEPA work,
7 obtaining the permits, the development of the mitigation plans,
8 in most DOT contracts, especially design-bid-build contracts,
9 those activities have to occur before the project can go out to
10 ad. So the contractor in a construction project for most typical
11 DOT projects under design/bid/builds, for example, doesn't have
12 responsibility for obtaining permits, obtaining the NEPA/SEPA
13 clearance, developing the mitigation plans. Those are provided
14 to them as part of the contract documents, and they then
15 implement those as part of the construction contracts. For
16 example, in our typical design/bid/build, we would include those
17 stream and wetland mitigation plans to the contractor as part of
18 that package that they are bidding on.

19 Q Ms. Hanson, you mentioned earlier in your testimony about how
20 fish windows can impact timing for the construction project. Can
21 you give a little bit more clarification about what you mean by
22 "fish window"?

23 A The fish window is the time in which you can do work within
24 waters of the state. And depending upon the watershed and the
25 stream that you're working in, the fish window can be different.

1 So I think I mentioned the other day that typically our projects
2 are from fish window and our -- projects within my region are
3 usually from July through September. Typically the right start
4 date for that is usually about June 15th through September 30th,
5 in general. So depending upon the stream and the watershed,
6 those fish windows can vary. So there's some streams within King
7 County, for example, where the fish window may only be two weeks
8 in August, so the fish windows vary.

9 The purpose of the fish window is to do the work when there's
10 potentially the least damage to the fish species that may be
11 within the stream. A requirement that comes with the HPA when
12 you are doing work in water, even though you're doing it within
13 the fish window, HPAs will come with the requirement to ensure
14 that you're doing fish exclusions, so that if there are fish
15 within the stream at the time that you're doing that work, that
16 you move them out of the project area to downstream so that they
17 can continue to go through the stream without harm. So we have
18 provisions in our HPA for those fish that we may encounter during
19 construction outlining, how we work with those fish to allow them
20 to safely continue to move through the stream system.

21 MR. SHAFTEL: Thank you, Ms. Hanson.

22 THE COURT: Cross-examination for Ms. Hanson?

23 MR. STAY: Yes, your Honor.

24 CROSS-EXAMINATION

25 By Mr. Stay:

1 Q Good morning, Ms. Hanson. How are you today?

2 A Good morning. Good, thank you.

3 Q What was your bachelor's degree in again?

4 A Environmental education.

5 Q Could you relate for us your work experience from the time
6 you got that degree until you went to work for the Department of
7 Transportation?

8 A After I graduated, I did substitute teaching in various
9 schools, K through 8, from about January until June, and then for
10 about, I think, two to three months, worked for the Department of
11 Social and Health Services down in Vancouver. And then I had --
12 started my internship with the Department of Transportation.

13 Q And then you related to Mr. Shaftel that work experience
14 after that. I won't go into that again.

15 Have you ever worked as a biologist?

16 A No, I have not.

17 Q Have you ever worked as an engineer?

18 A No, I have not.

19 Q Do you supervise either biologists or engineers?

20 A Yes.

21 Q You're a supervisor -- which biologists do you supervise?

22 A Within my organization, I have Michelle Steinmetz, who's our
23 biology program manager. For projects within my region working
24 for Michelle, I have Phil Bloch, who's a biologist primarily
25 working on the 520 project, and George Ritchotte, who is a

1 biologist working on various other projects.

2 Q And you evaluate their work, their biological work?

3 A I would not say I evaluate their biology work. I have
4 participation with them on discussions related --

5 Q But I just asked the question: Do you evaluate the work?
6 You said "no" or "yes"?

7 A No.

8 Q Do you tell them or advise them on biological questions?

9 A Yes.

10 Q So you give them biological advice?

11 A I give them input based on my experience on projects.

12 Q And that's based upon your education and experience?

13 A That's primarily based on my experience working on the
14 projects.

15 Q And you have no degree in biology?

16 A Correct.

17 Q You have no degree in fish management?

18 A Correct.

19 Q And you have no degree in anything relating to the natural
20 sciences?

21 A Correct.

22 Q Is it part of your job to determine that there is a culvert
23 blockage? Do you go out and say, This culvert blocks fish? Is
24 that your job?

25 A Specifically in the field?

1 Q Yeah. Do you make the determination that Culvert A is a
2 fish-blocking culvert? Is that part of your job?

3 A No.

4 Q Do you make the determination whether there should be a
5 culvert or a bridge as a replacement?

6 A No.

7 Q Do you make the determination what kind of culvert might be
8 used?

9 A No.

10 Q Do you make the determination of whether mitigation is
11 needed?

12 A Can you clarify what you mean by "mitigation"?

13 Q Sure. Do you make a determination of what biological
14 improvements need to be made to a culvert site to make up for the
15 culvert installation? Do you make that determination?

16 A I provide input.

17 Q But is it made by someone else, basically, a biologist -- a
18 fish biologist?

19 A Yes.

20 Q Do you determine whether or not a culvert is operating
21 correctly, to its design standard?

22 A No.

23 Q Do you determine whether or not it was the proper culvert to
24 be installed?

25 A No.

1 Q Do you oversee the budget process for a culvert? Is that
2 your responsibility, to be responsible for a budget for -- for a
3 DOT project? I-405, are you responsible for developing a budget
4 for that project?

5 A I don't understand your question.

6 Q Well, I assume that these projects that you work on are
7 fairly expensive and they have a large budget that goes into
8 them. My question is: Are you responsible for developing the
9 budget?

10 A For the project budget?

11 Q Yeah.

12 A No.

13 Q Do you have any real direct role in project budgets? Direct
14 role.

15 A Yes.

16 Q And that direct role is to create the budget?

17 A Through my role in working on scopes of work and negotiations
18 that are part of what goes into the overall project budget, yes.

19 Q So you'll tell a biologist how much a culvert costs and how
20 to figure that out?

21 A That specific example, no.

22 Q This is a culvert case. I think that's probably what we're
23 mostly involved in.

24 In your declaration, you have a number of cost items where
25 you relate -- I'm not going to have you go look for them, but

1 there are places where you identified particular costs with
2 particular culverts.

3 And the question I have for you is: Have you independently
4 verified the accuracy of those numbers?

5 A No.

6 Q Can you tell us whether they're high or low in terms of their
7 estimates?

8 A Compared to what?

9 Q Anything. To the actual construction. Can you tell me
10 whether or not those culvert -- those estimates are exaggerated
11 or overestimates, underestimates? Do you have any information on
12 that at all?

13 A No.

14 Q On Page 3 of your declaration, you say you provide over --
15 excuse me, environmental oversight. And I take that to mean
16 you're responsible for the NEPA and SEPA compliance; is that
17 correct?

18 A I am responsible for many other aspects other than NEPA and
19 SEPA.

20 Q Would you say that environmental oversight and responsibility
21 for NEPA and SEPA is a substantial portion of your responsibility
22 or a minimal?

23 A I'd say NEPA and SEPA is one of the larger portions.

24 Q But you don't deal with I-4 projects. Am I correct?

25 A That is correct.

1 Q You mentioned that -- you say in your declaration, in fact
2 you have an exhibit, Exhibit J, you have the WSDOT model
3 Comprehensive Tribal Consultation Process for the NEPA. That's
4 National Environmental Policy Act, and it's shortened to NEPA.

5 Do you remember that?

6 A Yes.

7 Q Are there some projects that the Department of Transportation
8 does that are under the State Environmental Policy Act?

9 A Yes.

10 Q And they -- I know some overlap. But are some exclusively
11 under SEPA rather than under NEPA?

12 A Yes.

13 Q The Exhibit J, the WSDOT Model Comprehensive Tribal
14 Consultation Process for the NEPA doesn't apply to SEPA. Am I
15 correct?

16 A The handbook as it was written applies to NEPA projects. On
17 my projects, we've implemented some of those --

18 Q Well, I'm not talking about that. My question was -- I'm
19 sorry. Sometimes I ask bad questions.

20 I thought my question was that that Model Comprehensive
21 Tribal Consultation Process doesn't apply to SEPA; is that
22 correct? As it's written, it doesn't apply to SEPA?

23 A As it's written, it applies to projects with NEPA.

24 Q My question was: It doesn't apply to SEPA; is that correct?
25 We know it applies to NEPA. It says so.

1 A For a SEPA-only project, no, it does not.

2 Q Thank you.

3 Are you familiar with Bob Barnard?

4 A Yes.

5 Q You know he has a slide show?

6 A Yes.

7 Q Have you ever seen that slide show?

8 A Yes.

9 Q You did. And you've seen it when?

10 A I have seen it as part of my involvement in this case.

11 Q You saw it after June 11th, 2009; is that correct?

12 A I cannot remember the date in which I first saw it.

13 Q On that day, you told me in a deposition that you had not
14 seen it.

15 A I believe what I told you in my deposition was I had not seen
16 Bob do the Power Point verbally but I had seen a hard copy of the
17 presentation.

18 Q Oh. You went through the slides, but you didn't go to his
19 presentation?

20 A Correct.

21 Q Do you know whether there's a rule, that you know of, that
22 the Department of Transportation employees are required to see
23 that slide show?

24 A Not that I'm aware of.

25 Q I want to talk about the rules when DOT fixes culverts on a

1 project and when they don't. As I understood your testimony, if
2 DOT is going to be actually working with a culvert, that there's
3 an obligation - and there's one exception we will get to - but
4 generally there's an obligation that you have to correct that
5 culvert; is that correct?

6 A Correct.

7 Q If you're not touching the culvert, you don't have to make
8 the correction?

9 A Correct.

10 Q You may, but you don't have to; is that right?

11 A Correct.

12 Q So you've two culverts side by side, both fish-blocking
13 culverts, and Culvert A is -- you're going to touch, and Culvert
14 B, you're not. And you would fix Culvert A but you may or may
15 not fix Culvert B?

16 MR. SHAFTEL: I'm going to object to the form of the
17 question. I believe what she said in her prior testimony was
18 that if they have to get an HPA for in-water work. We're using
19 jingoism about touching, which is not clear what that means.

20 MR. STAY: Jingoism? I don't know what that means.

21 THE COURT: The objection is overruled.

22 Do you remember the question?

23 THE WITNESS: Can you ask it again? I'm sorry.

24 By Mr. Stay:

25 Q Certainly. We've had conversations before, Ms. Hanson, and

1 I'm trying to remember that. If you've got two culverts side by
2 side in a project, and one you're going to be working in,
3 extending it, making it wider, whatever you're doing with that
4 culvert, and one you're not, and they're both fish-blocking
5 culverts, under the Memorandum of Agreement with the Department
6 of Fisheries, you have to address the one that you're actually
7 working in but you don't have to address the one you're not. Am
8 I correct?

9 A Correct.

10 Q Thank you. Now, we talked about there's a touch/no touch
11 rule when we had our deposition. Is that a fair sort of a
12 colloquialism of how it works? If you touch it, you have to fix
13 it; if you don't touch it, you don't have to.

14 A I don't use that terminology, but, yes, if you alter or
15 modify the culvert.

16 Q Okay. On Tuesday you provided us an example, I think
17 Highway 167, where you voluntarily fixed it - you had a long
18 explanation of why you decided to do that - and you indicated
19 that that was a retrofit.

20 Do you remember that? You didn't take the culvert out. You
21 retrofitted the culvert that was there? Am I right?

22 A That's the proposal, yes.

23 Q That's what you intend to do?

24 A Correct.

25 Q Now, we learned from Mr. Barnard that retrofits are temporary

1 fixes. And so I want to know, when you're putting this proposal
2 together, when have you scheduled that culvert to be corrected
3 fully?

4 A We have not scheduled that.

5 Q Now, we also learned from Mr. Barnard that retrofit -- one
6 other question.

7 The retrofit for 167, am I correct that's going to be with
8 the use of baffles? Is that part of the solution?

9 A One culvert is replacing baffles.

10 Q Now, I understand that when you deal with retrofits,
11 especially with baffles, there is a higher likelihood of having
12 maintenance problems. So my question to you is: What
13 maintenance program have you included in this proposal to address
14 that eventuality of having maintenance problems with those
15 culverts?

16 A The HPA that's been provided for the 167 project specifies
17 that if in the future the two retrofits become barriers, WSDOT is
18 to promptly obtain an HPA and correct that situation.

19 Q Very good. So you're on notice from the Department of
20 Fisheries that you have to be taking care of this. What program
21 have you developed as part of this proposal that's going to deal
22 with the additional maintenance?

23 In your proposal, what is the additional maintenance proposal
24 that you've included, if you have?

25 A At this time, we have not developed a maintenance proposal.

1 Q Thank you. Now, when you testified the other day, you
2 indicated that even when you're touching -- I'm sorry, jingoism
3 again.

4 Even when you are actually working in the culvert and you
5 have an HPA, there may be certain circumstances where you won't
6 correct that culvert anyway. And I think they are, and tell me
7 if I'm right, where there's extremely minimal gain and the costs
8 are extraordinarily high; is that correct?

9 A Correct. That's the language in the MOA.

10 Q Yeah. But those are the standards that you would use in
11 making a determination not to correct this culvert, even though
12 you're working in it; is that right?

13 A Correct.

14 Q I want to know if you can direct me to the document, the
15 Department of Transportation document that defines
16 extraordinarily high costs and extremely minimal gain, those
17 terms. You must use it all the time.

18 A I cannot.

19 MR. STAY: Your Honor, at this time, before I forget, I
20 would like to move the admission of AT-270, 1, 2, 3, 4, 5, 7 and
21 8. And I believe there's no objection from Mr. Shaftel.

22 MR. SHAFTEL: No.

23 THE COURT: So AT-270 through AT-277, with the exception
24 of 6?

25 MR. STAY: And then plus 8.

1 THE COURT: Like "Jon and Kate Plus Eight." All right.

2 MR. STAY: I'm sorry. My colleague says I may have
3 misspoken and confused the Court. I meant to say AT-270, dash 1,
4 dash 2, dash 3, dash 4, dash 5, dash 7, dash 8.

5 THE COURT: Thank you.

6 MR. STAY: I screwed up.

7 THE COURT: Any objection, Mr. Shaftel, to those
8 exhibits?

9 MR. SHAFTEL: I don't believe there's any objection,
10 your Honor.

11 THE COURT: Then those will be admitted, Madam Clerk.

12 MR. STAY: Madam Clerk, I believe you have them up there
13 close at hand. Could I have you hand them to the witness,
14 please?

15 By Mr. Stay:

16 Q Ms. Hanson, if you could just sort of thumb through those. I
17 just want to make sure you're familiar with them. I am not going
18 to ask you any questions about them. I just want to make sure
19 you know what they are. They should be based on your reports or
20 assessments on various projects.

21 A Is there one that is missing?

22 Q I didn't put them all in because, what I did, Ms. Hanson, I
23 tried to provide the ones that you provided me in your rebuttal.

24 A Well, it seems that there's a number missing. There's a No.
25 4, and I'm not seeing a No. 5 before it goes to No. 6. Those are

1 not ones --

2 Q They should be there. They just may be out of place. That's
3 okay. I'll check with the clerk to make sure that that's been
4 taken care of. Let me go to a question that may help us save a
5 bit of time. I didn't want you to go -- I didn't want to ask any
6 questions about the substance of those at all, but I wanted to
7 ask a question of whether or not you're familiar with them, you
8 recognize them.

9 A Yes, I do.

10 Q Do you know that they were provided to me during the rebuttal
11 file? Is that when I got them, if you know? If you don't know,
12 that's fine. Mr. Shaftel could have done them.

13 A Yes.

14 Q Did I get them then?

15 A I don't remember which part it was that you received them.

16 Q The question for all this effort is just this: Do you agree
17 with me that they contain information that would be useful in
18 evaluating a culvert, whether it is or is not a blockage, whether
19 it should or shouldn't be repaired? I mean, do those documents
20 contain information that you would consider to be useful in
21 examining culverts and whether they should be repaired or
22 otherwise?

23 MR. SHAFTEL: Object as to form. It's not clear in what
24 context they should be repaired, what he's referring to, in what
25 context they should be prepared.

1 THE COURT: Hang on a second.

2 From your perspective, do those documents contain information
3 that you would find useful in evaluating whether these are
4 blocking culverts?

5 THE WITNESS: Whether or not they're blocking culverts?
6 Yes.

7 By Mr. Stay:

8 Q Now, would you agree with me that these reports would be
9 useful to a tribe that might be evaluating a culvert?

10 MR. SHAFTEL: Objection, your Honor. This witness
11 doesn't have any --

12 THE COURT: The objection will be sustained.

13 By Mr. Stay:

14 Q On Tuesday, you mentioned mitigation. You mentioned it this
15 morning as well. I just have a couple of questions on that.

16 Are you the person in the Department of Transportation who's
17 responsible for determining what mitigation will be used on a
18 particular stream or river?

19 A Can you ask that again?

20 Q Certainly. Are you the person within the Department of
21 Transportation, or one of the people, I assume it's a big
22 organization, one of the people who's responsible for determining
23 what mitigation, the kind of mitigation that would be applied
24 with respect to a culvert project?

25 A Am I the sole person? No.

1 Q Are you the person that has decision-making authority on
2 that? Do you decide?

3 A Am I the sole person? No.

4 Q I'm just having trouble asking the question here. I
5 apologize. Are you the person that can say yes or no with
6 respect to a particular mitigation proposal?

7 MR. SHAFTEL: Asked and answered, your Honor.

8 MR. STAY: It hasn't been answered. She said she didn't
9 understand it.

10 MR. SHAFTEL: No. She said --

11 THE COURT: Hang on. You asked her if she was the
12 person who has decision-making authority. She said, I am not the
13 sole person.

14 MR. STAY: And I'm asking a question in a little more
15 detail, your Honor, whether or not she has up or down authority;
16 in other words, she is the one that when all is said or done, you
17 decide which mitigation goes forward.

18 THE WITNESS: I'm not the sole person, no.

19 MR. STAY: Reminds me of the other day, your Honor, and
20 I think you had a comment on this particular kind of answer.
21 Thank you.

22 By Mr. Stay:

23 Q On Tuesday, you talked about the consultation process.
24 You're the environmental coordinator for the urban corridors
25 project. You were; you're not anymore, right?

1 A I'm the director of environmental services for mega projects.

2 Q Right. Is that the same as -- I understand you got promoted.
3 That's all I am asking about.

4 When I first knew you, you were the coordinator for urban
5 corridors projects, and now I believe you have greater
6 responsibilities; is that correct?

7 A The name of our region has changed. My position has remained
8 the same.

9 Q Okay. Thank you. I just misunderstood.

10 Now, in the urban corridors area, the projects you've had the
11 most experience with, would you call those to be large projects?

12 A Some of our projects are considered mega projects; some of
13 the projects I oversee are not.

14 Q Let's look at some of these. The I-405, that's a big
15 project?

16 A Yes.

17 Q SR 167?

18 A It's not considered a mega project.

19 Q But is it big?

20 A Which project on 167 are you referring to?

21 Q 167 has lots of projects on it?

22 A Yes, it does.

23 Q Okay. I-5, is that a mega project?

24 A Which I-5 project?

25 Q So there are lots of I-5 projects?

1 A There are, but I don't oversee all of those.

2 Q Okay. So I'm getting the picture. You may have a highway,
3 like say SR 520 or I-405, and there may be lots of projects
4 dealing with that particular highway; is that correct?

5 A That is correct.

6 Q Are you generally responsible for overseeing all of those?

7 A I don't know what you mean by "all of those."

8 Q Let's say SR -- I-405 in the Kirkland to South Center area.

9 A Previously, as I noted, my previous role was the
10 environmental manager for I-405. And I previously in my role as
11 a director provided guidance and oversight to that team in my
12 director and deputy role.

13 Q Are there lots of culverts that you have to deal with on
14 those projects?

15 MR. SHAFTEL: Object as to form.

16 THE COURT: The problem, Mr. Stay, is words like "lots,"
17 words like "big," words like "large."

18 MR. STAY: I understand. I should know better than
19 that.

20 By Mr. Stay:

21 Q Do culverts play -- are culverts an issue that are involved
22 in all of those projects?

23 A In all of which projects?

24 Q I-405, 520, I-67, I-5, 518, do all of those projects involve
25 culverts?

1 A I don't know which I-5 projects you're referring to.

2 Q Okay. There's so many of them.

3 Are there any I-5 problems you've worked on that involve
4 culverts?

5 A The I-5 SR 18 triangle project has.

6 Q Now, you consult with many tribes, you've indicated:
7 Muckleshoot, Puyallup, Tulalip, the Snoqualmie Tribe, and
8 unrecognized Duwamish, you also indicated.

9 Where would you put Muckleshoot in that as being the tribe
10 that you consult with the most? Would that be the Muckleshoot
11 Tribe?

12 A Can you clarify what you mean by "consult with the most"?

13 Q Does the Muckleshoot Tribe -- do you and the Muckleshoot
14 Tribe interact on highway projects more than you interact with
15 representatives from other tribes?

16 A Regarding what type of issues?

17 Q Culvert issues.

18 A Yes, typically.

19 Q Thank you. Got there.

20 Now, just looking at -- are you involved in the consultation
21 process with the Quinault Tribe?

22 A I'm sorry? Can you ask that again?

23 Q Are you involved with the DOT tribal consultation process
24 with the Quinault Indian Nation?

25 A To a limited extent, yes.

1 Q They're on the Olympic Peninsula?

2 A I don't know if the area that they're in is considered the
3 peninsula. But, yes, they're on the coast.

4 Q And then you'd also deal with the Hoh Tribe, I suspect,
5 right?

6 A I have not specifically.

7 Q You talked about Thunder Hills, and I want to spend just a
8 moment on Thunder Hills. That seemed to be an issue that was
9 resolved through consultation with the Muckleshoot Tribe, the
10 Corps of Engineers, the Department of Fish and Wildlife and the
11 Department of Transportation.

12 Am I correct on that?

13 A Correct.

14 Q And that was a positive consultation process, in your mind?

15 A We had an outcome with a solution to move forward.

16 Q And having an outcome with a solution; that's a good thing, I
17 take it?

18 A Yes.

19 Q Now, for Thunder Hills, let me see if I can tick down some of
20 the factors that were involved. You had an emergency; am I
21 correct?

22 A Correct.

23 Q And the culvert that was immediately below the Thunder Hills
24 culvert, the culvert going underneath the highway, that would
25 have been smaller than, say, a stream simulation culvert or a

1 fish-passing culvert if that had been built under the highway.

2 Am I correct?

3 A Can you ask that again, please?

4 Q When you were looking at that -- first, let's go back. When
5 you had this emergency, there was a culvert that collapsed. Am I
6 correct?

7 A Correct.

8 Q And that was the problem. You had to fix that culvert; am I
9 correct?

10 A Correct.

11 Q And I assume the Muckleshoot Tribe wanted a culvert that
12 passed fish. That was their initial position, I take it, right?

13 A Correct.

14 Q But there were some problems in being able to do that. And
15 one of the problems, as I understand it, and I want you to verify
16 this, was that directly below or downstream from the culvert
17 under the 405 roadway was another culvert not owned by the
18 Department of Transportation, which was small; is that correct?

19 A I'm sorry. Did you say "small" --

20 Q I did say "small."

21 A -- or "smaller"?

22 Q I did say "small."

23 A I don't think I can quantify it. I'm not sure what you mean
24 by "small."

25 Q If you had put a stream simulation culvert, for example, a

1 larger culvert under the highway, one that would pass fish, would
2 there have been a problem with the existing culvert directly
3 downstream from that new culvert?

4 A I don't understand what you mean when you say "problem with
5 it."

6 Q Was the culvert downstream of a new culvert under the roadway
7 sufficiently sized to be able to accommodate the flows that would
8 be anticipated in the new culvert that would be fish bearing
9 under the highway? If you don't know, that's fine.

10 A From the work I did with the team, we had stream simulation
11 designs that worked with that downstream culvert without
12 modifying that culvert, I believe.

13 Q Okay. Fine. There were power lines and sewer lines that
14 were a problem in installing a new culvert; is that correct?

15 A Yes.

16 Q You indicated the other day there was a problem with the kind
17 of equipment you would need to bore that tunnel, that culvert?
18 You didn't have the equipment that could be used; is that
19 correct?

20 A I believe what I said was with the trenchless technique, the
21 size of the stream simulation culvert that we looked at exceeded
22 the size of the equipment that's typically used for that work.

23 Q So the result was -- the result, by the way, it was contained
24 in a Corp of Engineers permit, was it not?

25 A It was a 404 permit.

1 Q Now, that permit included some off-site mitigation, am I
2 correct, that you're working on now?

3 A Correct.

4 Q So the result of this, if I might see if you agree with me,
5 was the correction of the emergency, the provision of mitigation,
6 all with the consultation of at least one Indian tribe. Is that
7 a fair summation?

8 A Yes.

9 Q On Page 10 of your declaration there, we talked about Project
10 305, which I've already dropped my objection to. But I just want
11 to ask a couple of questions on it, if I might.

12 Were you personally responsible for overseeing that project,
13 SR 305?

14 A I was not.

15 Q Did you do any work on that project?

16 A I did not.

17 Q You didn't supervise the project, then?

18 A Correct.

19 Q You have visited that project, though, have you not?

20 A I have.

21 Q And you visited that project when?

22 A Either in September or this month.

23 Q So you visited that project for the first time after at least
24 we had our deposition meeting on July 28th, 2009?

25 A Correct.

1 Q On Page 11 of your declaration, I think we -- we're talking
2 about the 305 project, and on Page 11, the last paragraph, you
3 say, "All the fish-passable structures are successfully providing
4 fish passage today."

5 You're not making that statement from any personal
6 involvement in the project, are you?

7 A Correct.

8 Q You're reporting what somebody told you?

9 A Correct.

10 Q Just a couple more questions, Ms. Hanson, and then we'll be
11 through.

12 In your declaration, Exhibits M through S, are a series of
13 pictures, diagrams. And we have some more today. Mr. Shaftel
14 even added to the record with the additional pictures. A couple
15 of questions on all that as a group, and if you can't answer it
16 as a group, then we'll have to break it down.

17 A Can you refer to the ones that we're discussing? I don't
18 know them by that information.

19 Q Certainly. Yes, you can. They're Exhibits M through S of
20 your declaration. Just a few simple questions.

21 Did you take those pictures?

22 A No, I did not.

23 Q Did you develop the culvert designs that were used in any of
24 those depicted projects?

25 A No, I did not.

1 Q Did you supervise the installation of any of those projects
2 that we see in those pictures?

3 A Can you clarify what you mean by "supervise the
4 installation"?

5 Q Were you out there telling people how to build them?

6 A I was not telling them how to build the culvert.

7 Q Did you review each culvert that's depicted there to see
8 whether or not it was installed correctly?

9 A No, I did not.

10 Q Did you monitor any kind of compliance with respect to that
11 construction, whether or not it complied with design criteria?

12 MR. SHAFTEL: Your Honor, I'm not sure where we're going
13 with this questioning. I think she's already established that
14 she was not at this project.

15 MR. STAY: Okay. I don't need to ask the question, your
16 Honor. We can go forward.

17 By Mr. Stay:

18 Q Can you say from your own personal knowledge any one of those
19 culverts is today properly - not the word "properly" - today is
20 passing salmon and is no longer a barrier to fish passage at all
21 life stages and all salmon species? Can you tell me that from
22 your own personal knowledge?

23 MR. SHAFTEL: Your Honor, that's not testimony from her
24 declaration. That's a mischaracterization of testimony.

25 MR. STAY: I'm not --

1 THE COURT: Hang on. Overruled.

2 You may answer.

3 THE WITNESS: Can you repeat the question, please?

4 By Mr. Stay:

5 Q Probably not, but I'll try to rephrase it a little better.
6 Can you tell us from your own personal knowledge whether these
7 culverts which are depicted in these pictures are today presently
8 no longer fish barriers and passing fish, salmon, at all life
9 stages, and all species of salmon?

10 A From personal knowledge, I can for the Forbes Creek.

11 Q Forbes Creek. And that one is which one?

12 Oh, I see it. That would be O, Q?

13 A Correct.

14 Q And so that culvert design and installation there, that's
15 what kind of culvert design?

16 A That is a fishway.

17 Q That's a fishway. And you know that fishway is passing fish
18 at all life stages? You know from your own personal knowledge
19 and experience that that culvert is passing fish at all life
20 stages?

21 A From my experience from working with the I-405 team recently
22 on that project, I understand that Fish and Wildlife staff have
23 recently been out to verify --

24 Q No, no, no, no, no, no. Excuse me. I didn't ask that.

25 I asked whether you, from your experience, can independently

1 verify for us that that culvert is properly functioning to pass
2 salmon at all life stages.

3 A Independently verified it? No, I have not.

4 Q Thank you. On Exhibit M, as in "mostly" done, do you have
5 that?

6 A Yes.

7 Q On Figure 41, there's a statement, "Four fish passage
8 barriers on South Fork Dog Fish Creek have been replaced to date
9 with 100 percent passable culverts."

10 Do you have any independent knowledge that that statement is
11 correct?

12 A I do not.

13 MR. STAY: Thank you. I appreciate your help. I'm
14 done.

15 THE COURT: Ms. Hanson, before we get to redirect from
16 Mr. Shaftel, help me understand mitigation a little bit better.
17 When you determine that as part of a project on a culvert you're
18 not going to be able to correct it, for whatever reason, it
19 doesn't matter what the reason is, mitigation then kicks in; is
20 that correct?

21 THE WITNESS: Correct.

22 THE COURT: When that occurs, how do you decide which
23 tribe to consult with? Is it just the tribe that that culvert is
24 within their jurisdictional area?

25 THE WITNESS: In the example of the triangle project we

1 talked about where we did that exception, both Puyallup and
2 Muckleshoot have treaty rights. I believe Muckleshoot, that's
3 one area we typically consult with them on, but we talked with
4 both of the tribes. And in that case, in working with the
5 fishery staff from Muckleshoot, they told us primarily we should
6 be working with the Puyallup Tribe.

7 And so in any project scenario, we would look at all of the
8 tribes that we would need to consult with. And then if they
9 chose to consult with us on the project, we would include them in
10 the process.

11 THE COURT: From your department, who makes that --
12 somehow you come to the process where you say, Okay, we are going
13 to need mitigation in this project.

14 Do you then make a phone call? Do you send a letter? How do
15 you notify the tribes?

16 THE WITNESS: We -- typically when we're starting a
17 process, we will send a letter to a tribe notifying them that we
18 are asking them to consult with us on a project. We have a
19 requirement to do so under Section 106, which is the
20 archeological component of our project. And typically on
21 projects, we will also ask for Natural Resource input on
22 projects. And so that's one way that we will do it.

23 We have -- from the work that the agency's done and in
24 working with tribes, we have an understanding of which tribes
25 have U&A or interest in specific areas. So for my projects, we

1 have five or six tribes that we consult with on all of our
2 projects, and some of those tribes may have more interest in
3 culverts than in others.

4 But we'll typically know -- at least on my projects and my
5 experience, we know which tribes we need to consult with.

6 THE COURT: So the consultation process occurs. There's
7 a give-and-take, whether its negotiated or not, I understand.
8 You come up with a potential resolution of it. And who then from
9 your department has the final say on this is what is going to
10 happen, in terms of mitigation?

11 THE WITNESS: On a project team perspective, for example
12 on the triangle project, it was collective, so we have a project
13 engineer from a design site who's overall responsible for the
14 overall design, and I was the environmental lead for the project,
15 so the two of us. And we would work with staff from Fish and
16 Wildlife, and then we'd work with the staff from the Puyallup
17 Tribe. We also worked with the staff from Fish and Wildlife,
18 both with the area habitat biologist that's issuing the permit,
19 as well as Mike Barber and staff from the task group that
20 actually oversee the barrier list, as well as Paul Wagner at
21 headquarters. So usually in the exception process, at least in
22 my experience, it's been --

23 THE COURT: A group effort.

24 THE WITNESS: -- a group that's involved collectively
25 deciding that that's going to be how we're going to go forward.

1 In the case of the triangle project, for example, we have the
2 mitigation agreement with the Puyallup that notes that agreement
3 between the State and the tribe.

4 And then when Fish and Wildlife issues us our Hydraulic
5 Project Approval, one of the things that's included in the permit
6 as a standard is that there's a reference to the specific design
7 and the specs that we'll implement in construction. So the HPA,
8 when it's issued, will reference what that essential agreement
9 is, per say, between the State and DOT about what that design is
10 that will go forward, or in the case of the triangle project,
11 note what the mitigation is that's being provided in lieu of the
12 replacement.

13 THE COURT: And what happens in a situation where the
14 tribe that you're working with disagrees with your proposed
15 resolution? Do they have any sort of appeal? Can they go higher
16 up?

17 THE WITNESS: They could go higher up. Do you mean
18 higher up within the agency?

19 THE COURT: Yes.

20 THE WITNESS: Yes. I mean, there could be the potential
21 to go higher up within our agency to the secretary of
22 transportation, and go up from that standpoint.

23 Depending upon the project, there's also the ability to work
24 with the resource agency who oversees that particular permit to
25 seek resolution. Specifically for those agencies that are

1 issuing a permit that they have requirements of consulting with
2 the tribes and having jurisdiction, they'll typically work with
3 us to have those issues resolved before they'll issue the permit,
4 so there's various ways that the issue can be resolved.

5 If in what I would call a worst-case scenario, if a permit is
6 issued and the tribe does not agree, depending upon the permit,
7 there would also be the potential of appealing or challenging a
8 permit.

9 THE COURT: Has that ever happened on one of your
10 projects?

11 THE WITNESS: Not on one of my projects.

12 THE COURT: All right. Any redirect?

13 MR. SHAFTEL: Just a couple of questions.

14 REDIRECT EXAMINATION

15 By Mr. Shaftel:

16 Q Ms. Hanson, you were asked a number of questions about the SR
17 305 project and why you made references to the projects -- or to
18 the barriers that were fixed during the course of that highway
19 improvement project being fish passable today.

20 Do you remember those questions just a moment ago?

21 A Yes.

22 Q Did you -- are you familiar with the fish passage progress
23 report that the DOT puts out?

24 A Yes, I am.

25 Q And have you reviewed those before drafting your declaration?

1 A Yes.

2 Q Will you turn to your screen there? And I'll represent to
3 you this is a page from the 2009 fish passage report. Do you see
4 the lines on this page that say "SR 305, Dog Fish Creek"?

5 Starting about halfway down the page, there's two of them, and
6 then you get down -- as you go further down the page, there's a
7 third one, there's a fourth, and I believe there's a fifth down
8 at the bottom.

9 Do you see all those?

10 A Yes, I do.

11 Q Is that where you got the information from your declaration
12 regarding whether or not these projects continue to be fish
13 passable -- or maybe I should ask it this way. Have you looked
14 at this to confirm in fact that these are fish passable as of
15 today and that's why you included them in your declaration?

16 A Did you say this is the 2009?

17 Q This is the 2009.

18 A I believe when I wrote -- included that in my declaration, I
19 was looking at the 2008 and then also verified that with Jon
20 Peterson in our headquarters group.

21 Q Okay. So you looked at a comparable table from 2008?

22 A Correct.

23 Q And so on that 2008 table, what did it say under "fish
24 passage satisfactory, yes or no," for those five projects?

25 MR. STAY: Objection, your Honor. The project speaks

1 for itself.

2 THE COURT: It does, Mr. Shaftel.

3 MR. SHAFTEL: I'm sorry. We're looking at a 2009 table.
4 I am asking her about what she remembers about her 2008.

5 MR. STAY: All the tables speak for themselves.

6 THE COURT: They're admitted in evidence. They speak
7 for themselves. It's fine.

8 By Mr. Shaftel:

9 Q And there are several barriers that DOT fixed that were not
10 state barriers; is that right? That's what you testified to
11 earlier?

12 A Within that project, yes.

13 Q Right.

14 MR. STAY: Object, your Honor. That's outside the scope
15 of cross. I didn't ask about any barriers except state barriers.
16 Move to strike.

17 THE COURT: Her answer will stand. But where are you
18 going with this?

19 MR. SHAFTEL: Well, I thought he asked a number of
20 questions about pictures that she had attached to her declaration
21 that may or may not be state barriers that reflected that they
22 were in fact continuing to be fish passable. I just wanted to
23 find out what her foundation was for her identifying them.

24 THE COURT: I don't think it's necessary, because we
25 stayed in cross-examination only on the state-owned.

1 MR. SHAFTEL: Okay.

2 By Mr. Shaftel:

3 Q You mentioned -- you were asked some questions about whether
4 or not the NEPA handbook that you've attached to your declaration
5 applies to SEPA projects. What's your experience with whether or
6 not DOT in fact follows the guidelines that are put out in that
7 NEPA handbook on SEPA-only projects?

8 A For many of the projects that I work on, the documents need
9 both NEPA and SEPA clearance. And so we will typically, if we're
10 doing, for example, an environmental assessment, which is a NEPA
11 requirement, we will adopt that environmental assessment as our
12 SEPA checklist to meet our state requirements as well.

13 And so for the majority of the projects that I work on and
14 oversee, our environmental documentation is for both NEPA and
15 SEPA, and so we follow the procedures within the NEPA handbook
16 for those projects which are meeting both of those requirements.

17 So for my projects, that NEPA handbook really works and is
18 followed for projects that are meeting both the National and the
19 State Environmental Policy Act requirements.

20 Q You were asked questions about whether or not the DFW has --
21 or I guess whether DOT has the final say on what design to use,
22 whether it be stream sim or hydraulic.

23 How does the DOT work with the Department of Fish and
24 Wildlife on design issues?

25 A We typically on our projects will work -- our biological

1 staff, engineering staff, will work with the area habitat
2 biologists, who are the ones who essentially permit -- provide us
3 with the HPA permit for the project. And so depending upon the
4 specific project, that may happen in a couple different ways.

5 One example would be having meetings throughout the
6 development of the design of the replacement structures with the
7 technical staff from DOT and the Fish and Wildlife staff, and
8 tribes may be involved in those conversations as well, to develop
9 the design.

10 As I mentioned earlier, when the Hydraulic Project Approval
11 is issued to DOT for a project, one of the standard terms
12 included in the HPA is a reference to the specific plans and
13 specs that we will implement for construction of that project.
14 So the actual permit itself, when it's issued, notes the specific
15 design requirements that we're going to follow. It references
16 our plan set, essentially.

17 MR. SHAFTEL: Thank you.

18 MR. STAY: One question, if I might?

19 RECROSS-EXAMINATION

20 By Mr. Stay:

21 Q I am looking for Exhibit J. That's the WSDOT comprehensive
22 and NEPA manual we've talked about and Mr. Shaftel asked you
23 about. I'd like you to thumb through to Page I-5.

24 A I'm sorry. Which page did you say?

25 Q I-5. Introduction 5, the page right at the beginning. This

1 is the J, WSDOT Model Comprehensive Tribal Consultation Process
2 for NEPA.

3 Did you find it?

4 A No. Which page did you say?

5 Q I-5. It is five pages from the beginning.

6 A Thank you. I was looking for I-5, not 1-5.

7 Q I apologize. I for "Introduction," which is part of J
8 document.

9 Do you see the bold print in the middle?

10 A Yes.

11 Q Can you read that for us, please?

12 A "What's not included in this document."

13 Q Would you go down to the third bullet?

14 A Yes.

15 Q Would you read that?

16 A "Consultation process for State Environmental Policy Act only
17 projects."

18 MR. STAY: Thank you. Now I'll take all my stuff.

19 THE COURT: Ms. Hanson, you'll be glad to hear you can
20 step down. Thank you very much.

21 Counsel, let's go ahead and take our morning recess at this
22 time.

23 (At this time, a short break was taken.)

24 MR. GRUBER: Your Honor, we have a couple more
25 housekeeping matters. The first relates to the testimony of Alex

1 Nagygyor from Tuesday.

2 Towards the end of my cross-examination, the Court may recall
3 that I referred to the witness's deposition from July 20th of
4 this year for purposes of impeachment. I would now move to
5 publish the original transcript of that deposition.

6 THE COURT: Mr. Ferester, any objection?

7 MR. FERESTER: Your Honor, we would object. Essentially
8 this was an inquiry into matters that Mr. Nagygyor did not
9 testify to. He did not offer rebuttal testimony. You may recall
10 that this involves the lost fish issue that we've had lots of
11 discussion about.

12 Your Honor allowed one question into that matter. That's the
13 question I believe Mr. Gruber referred to and read from the
14 deposition to refresh the witness's recollection. There were
15 subsequent questions to which I objected and you sustained.

16 I just believe that this matter is irrelevant and wasn't
17 addressed in the direct testimony. There's no need to publish
18 the deposition.

19 THE COURT: Okay. Mr. Gruber, I think that's correct.
20 I don't think there's any need to publish it, Counsel. You read
21 the portion that pertained to the issue and the question that was
22 being discussed into the record at the time. I think that's
23 sufficient.

24 MR. GRUBER: Okay. Thank you, your Honor.

25 MS. FOSTER: Your Honor, I have one other matter. This

1 morning I filed with the clerk of the court a bench memo with
2 regard to the admissibility of a number of other plaintiffs'
3 exhibits. I provided a copy electronically to the State
4 yesterday, and I provided a copy also to your law clerk
5 yesterday.

6 It's my understanding from speaking with the counsel for the
7 State that they would like to have an opportunity to respond to
8 that, but I just wanted to place on the record that I am moving
9 for admission of the exhibits that are contained within the bench
10 memo.

11 THE COURT: And I think the State certainly has the --
12 let me rephrase that. The Court did receive a copy of this, a
13 courtesy copy, delivered to chambers, and so I was aware of the
14 issue. It's certainly something we can take up next week, and of
15 course the State has a right to respond. All right?

16 MS. FOSTER: Thank you, your Honor.

17 THE COURT: Counsel, before we call our next witness,
18 while I'm thinking about it, I'm sure that our clerk has already
19 informed you of this, but we moved all of our sentencing to try
20 to maximize our trial day today. One sentencing, we could not
21 move. We will be starting at one o'clock. It normally takes at
22 least 30 minutes. This one might take perhaps 30 to 40 minutes.
23 So we'll have just a little bit longer lunch break for you,
24 because I'm sure there will be probably ten to 15 people in here
25 for that particular sentencing, so we'll just need to have you

1 wait a little bit before we get started this afternoon. All
2 right?

3 MR. STAY: Your Honor, may we leave our materials here?

4 THE COURT: You're fine. We just need a space cleared
5 so counsel can sit. When we break for lunch, our clerk can tell
6 you exactly where. That would help.

7 All right. You may call your next witness.

8 MS. WOODS: Your Honor, the State will call Dr. Jeff
9 Koenings.

10 THE COURT: Dr. Koenings, if you would approach in front
11 of our clerk to be sworn in, and raise your right hand.
12 Whereupon,

13 JEFFREY KOENINGS

14 Called as a witness, having been first duly sworn, was examined
15 and testified as follows:

16 THE COURT: It's nice to see you again.

17 THE WITNESS: It's nice to see you. It's a pleasure to
18 be here.

19 THE CLERK: Please state your full name and spell your
20 last name for the record.

21 THE WITNESS: My full name is Jeffrey Paul Koenings.
22 The last name is K-O-E-N-I-N-G-S.

23 THE COURT: Ms. Woods, you may inquire.

24 MS. WOODS: Your Honor, we did have a motion to use
25 Dr. Koenings' video deposition. Now that he's here live, that

1 motion is moot and will be withdrawn.

2 THE COURT: Thank you.

3 DIRECT EXAMINATION

4 By Ms. Woods:

5 Q Good morning, Dr. Koenings.

6 A Good morning.

7 Q Where do you work?

8 A I work in Olympia at the Recreation and Conservation Office
9 for the State of Washington.

10 Q What do you do for that office?

11 A My primary responsibilities are as a commission
12 representative. That means I do work relative to salmon
13 commissions, the primary one being the Pacific Salmon Commission,
14 the Pacific Salmon Treaty with Canada.

15 Q Did you just fly in from Sitka, Alaska, yesterday evening?

16 A Yes. Gratefully, I made it. Yes, I did.

17 Q Why were you in Sitka?

18 A There was a meeting of the Pacific Salmon Commission, which
19 is the implementing body for the Pacific Salmon Treaty. We were
20 there discussing various matters dealing with the conduct of
21 future meetings in January and February. It was a bilateral
22 meeting with the Canadians.

23 Q What did you do before you joined the Recreation and
24 Conservation Office?

25 A I was director of the Washington Department of Fish and

1 Wildlife for ten years.

2 Q What were your responsibilities as director of Washington
3 Department of Fish and Wildlife?

4 A Well, the responsibilities were trying to referee five
5 particular programs within the Department of Fish and Wildlife.
6 Basically the program dealing with wildlife, fish, fisheries,
7 habitat section, enforcement, which is always an interesting
8 endeavor, and of course the inter-governmental resource
9 management unit that I basically started.

10 So the duties were trying to conduct budgets and basically
11 program direction -- policy direction for those particular
12 programs.

13 Q Were you involved in salmon recovery activities during that
14 time?

15 A Very much so. Very much heavily involved in those
16 activities. As you know, we have a co-management relationship
17 with the tribes, and fish and wildlife are basically part of that
18 co-management, so it's a heavy, heavy responsibility with the
19 department to cooperate with the tribes in terms of managing fish
20 and wildlife.

21 Q What kind of salmon recovery activities were you involved in?

22 A Many activities. Fortunately or unfortunately, when I
23 arrived in the state, they were just beginning their response to
24 the various listings of salmon under the Federal Endangered
25 Species Act. That act, of course, was administered by NOAA

1 Fisheries or the National Marine Fisheries Service.

2 We were in a state of beginning to put together a policy
3 direction in terms of how the State would participate and respond
4 to various listings of salmon in the state of Washington. We
5 got, as Department of Fish and Wildlife, in the beginning of
6 identifying direction of the State through the natural resource
7 cabinet, where that particular endeavor would go. It was an
8 attempt by the State to say it would basically be heavily
9 involved in salmon recovery activities.

10 "Extinction is not an option" was one of the documents that
11 was put forward. And the Department of Fish and Wildlife was
12 heavily involved in those discussions.

13 Q What did you do before you were appointed director of the
14 Washington Department of Fish and Wildlife?

15 A I worked for the State of Alaska for the Alaska Department of
16 Fish and Game. And in that position, I started out as a research
17 scientist. I worked in that particular capacity as a statewide
18 position dealing with limnology, which is the productivity of
19 lakes and streams towards the production of salmon, principally
20 Sockeye and Coho.

21 Some say I joined the dark side and became a policy maker in
22 Juneau. In that regard, I ran various divisions in the Alaska
23 Department of Fish and Game Commercial Fisheries division, and
24 the division that was responsible for the hatchery program and
25 the rehabilitation and enhancement of fish in the state of

1 Alaska.

2 From there I moved into what they call the commissioners
3 office, and I was a special assistant to the commissioner dealing
4 with international issues that dealt with Alaska.

5 Q Maybe by "dark side," they meant the weather in Juneau.

6 A Yes, true.

7 Q How long did you work for the State of Alaska?

8 A I worked there for 21 years.

9 Q Would you please describe your educational background?

10 A I will. It's sort of in my distant past, but I think I can
11 remember.

12 I attained a Bachelor of Science degree in fisheries from the
13 University of Michigan. And then I had a Master of Science
14 degree, which was a combined program with the School of Natural
15 Resources and ecology engineering and water resources management.
16 And then I have a Ph.D. at the University of Michigan in natural
17 resource management.

18 And after that, I went down to the University of North
19 Carolina, Chapel Hill, and did a two-year post doc at the School
20 of Public Health dealing with nutrient cycling in coastal
21 estuaries.

22 Q In total, about how many years of professional experience do
23 you have in the areas of salmon biology and management?

24 A I would say about 30.

25 Q Dr. Koenings, did you prepare a Declaration in Lieu of Direct

1 **Testimony for this sub-proceeding?**

2 A I did.

3 Q I would like Madam Clerk to please hand Dr. Koenings the
4 binder with Exhibit W-085.

5 A You build up a lot of muscles dealing with these things.
6 Yes, I have it.

7 Q Do you recognize Exhibit W-085?

8 A Yes, I do.

9 Q What is it?

10 A It is the Declaration of Jeffrey P. Koenings, Ph.D., in Lieu
11 of Direct Testimony.

12 Q Would you please turn to Page 27?

13 A Got it.

14 Q That's your signature on Page 27?

15 A Yes, it is.

16 Q What's the date of your signature?

17 A 31st day of March 2009.

18 Q Dr. Koenings, do you adopt Exhibit W-085 as your direct
19 testimony today?

20 A I do.

21 MS. WOODS: I'd like to offer Exhibit W-085 for
22 admission into evidence.

23 MR. STAY: We have no objection. You're not going to
24 the exhibits yet, are you?

25 MS. WOODS: That's next.

1 THE COURT: Thank you, Mr. Stay.

2 W-085 is admitted.

3 MS. WOODS: Your Honor, Mr. Stay just referred to the
4 exhibits that are associated with Dr. Koenings' declaration. We
5 have 22 of those. I believe three are already admitted. Those
6 would be W-085-A, W-085-C, and W-085-S, as in "state."

7 THE COURT: That jibes with our records, yes.

8 MS. WOODS: It's my understanding that the plaintiffs -
9 and I appreciate Mr. Stay's cooperation on this - will not be
10 objecting to 13 of the remaining exhibits. I think that I have
11 this list correct, and so I will read it off, and Mr. Stay will
12 tell us whether I'm wrong on any of these.

13 The list that I believe that is not objected to is W-085-B,
14 as in "boy," W-085-D as in "dog," W-085-E, W-085-F, as in
15 "Friday," W-085-I, W-085-L, W-085-M, W-085-N, W-085-O, W-085-P,
16 W-085-Q, W-085-R, and W-085-V.

17 I'd like to offer those 13 exhibits that I just listed into
18 the record.

19 MR. STAY: No objection, as long as J and K are not on
20 the list.

21 THE COURT: J and K were not on that list. The rest, as
22 indicated by Ms. Woods, will be admitted, Madam Clerk.

23 MS. WOODS: The plaintiffs have objected to W-085-G.
24 I'd like to withdraw that one and substitute in its place joint
25 Exhibit 25, which I believe has already been admitted.

1 THE COURT: Joint Exhibit 25 has already been admitted.
2 You are withdrawing W-085-G, as in "goat"?

3 MS. WOODS: Yes.

4 THE COURT: Thank you. That will be withdrawn.

5 MS. WOODS: We're also withdrawing two additional
6 exhibits: W-085-T and W-085-U.

7 THE COURT: W-085-T and U will also be withdrawn.

8 MS. WOODS: I believe that leaves three exhibits. We
9 will be addressing those during Dr. Koenings' testimony.

10 By Ms. Woods:

11 Q Dr. Koenings, on the Table of Contents on the first page of
12 your declaration, there's a reference to the four Hs.

13 What are the four Hs?

14 A The four Hs are a simple way of looking at salmon recovery in
15 terms of those factors that impact salmon, have impacted salmon,
16 and those factors that need to be corrected in order for salmon
17 to be restored, delisted in the state of Washington. They are:
18 hatcheries, harvest, hydropower, and habitat.

19 Q Do you have a slide in front of you?

20 A I do. That slide depicts those particular four components
21 and how these components are broken out in each one of the
22 watersheds. Let's say we are dealing with Chinook in the Puget
23 Sound case area. Each one of these quadrants would be of
24 different sizes, depending on the unique fingerprint of what
25 needs to be corrected in each one of those habitats.

1 As you see in the diagram -- and I can use an example, if you
2 will. For example in the Nooksack, we basically have an area
3 here where harvest is not going to basically be able to be
4 addressed any more than it is, so I would draw a smaller line of
5 the impact of harvest. It's a great impact, but because of that
6 harvest occurring mostly in Canada, there's not much we can do to
7 correct that.

8 There is some small dams on the Nooksack, so hydropower is
9 not really going to be a major issue on the Nooksack. There is a
10 hatchery program that we need to deal with on the Nooksack River,
11 so hatcheries will play a larger role, if you will. And then of
12 course there is a huge habitat component on the Nooksack in terms
13 of getting to salmon recovery.

14 So basically here you have two of the major quadrants that
15 are, I think, the major ingredients of addressing salmon recovery
16 in the Nooksack.

17 Now, if you go to another watershed, for example the Skagit,
18 there isn't a lot of hatchery influence on the Skagit. There is
19 some, but not an awful lot. So that impact would be fairly
20 small.

21 The harvest impacts to be corrected, we are putting
22 substantial numbers of fish on the spawning grounds, maybe not
23 for all segments but for a majority of the fish. Harvest is
24 really not a problem on the Skagit. There is a small hydropower
25 project, but I think with the FERC relicensing we've addressed

1 most of those issues, so a lot of that will be fairly minor. But
2 there's a huge habitat component on the Skagit. And these
3 particular major limiting factors, I think we've identified most
4 of that -- not all, but most of that habitat relies, in terms of
5 being restored, in the estuary portion of that particular system.

6 I'd just like to go through perhaps one more to illustrate my
7 point about diversity.

8 MR. STAY: Your Honor, may I interrupt and object,
9 please. I believe this is outside the scope of his declaration.
10 It's supposed to be a summary of what's there. I don't believe
11 that these examples and discussions are part of it, so therefore
12 it's not an appropriate summary.

13 As interesting as it might be, it's not an appropriate
14 summary, and we would move to strike it.

15 THE COURT: Ms. Woods?

16 MS. WOODS: I believe it's correct that those particular
17 examples are not in his declaration, but Dr. Koenings does talk
18 about the four Hs in his declaration.

19 THE COURT: I think so. I understand that it's
20 background for setting up to getting to the specific examples
21 that will be at issue here.

22 So you may continue.

23 THE WITNESS: Thank you.

24 By Ms. Woods:

25 Q Dr. Koenings, were you about to give an additional example?

1 A I would just like to, again, give an addition example. Move
2 to the south Sound, maybe the Nisqually system, if you will. The
3 tribes have been just really excellent in terms of working with
4 the State and other federal agencies, for example on the
5 Nisqually, the refuge, etcetera, so they have dealt with a lots
6 of habitat issues. There's some more to be dealt with, but
7 habitat is really being dealt with quite nicely there.

8 There are some dams in the upper part of the Nisqually, so
9 hydropower again is really not that much of an issue. We do have
10 an issue in terms of the harvest and hatchery component here in
11 the Nisqually that the co-managers have to deal with.

12 The whole idea here is to just to give everybody an
13 understanding that the four Hs are unique in terms of their
14 combination or integration to get the salmon recovery in each one
15 of the watersheds. That's why it's so complex and difficult in
16 terms of dealing with the individual watersheds, because of this
17 unique fingerprinting that does go on in terms of the four Hs.

18 Q Where do fish passage barrier culverts fit in the four Hs?

19 A They fit in the habitat component of these. On the lower
20 right-hand corner quadrant, along with major limiting factors
21 here, fish passage barriers are very definitely a problem in some
22 of the watersheds that need to be corrected, so they would be
23 part of that fingerprinting process.

24 Q Do you have an overall vision of salmon recovery?

25 A I do.

1 Q I just put up a slide. What is that vision? Would you
2 describe how it relates to the slide that I've just put up?

3 A I would like to, and I'll try to be brief, because it is a
4 complicated issue and this is a complicated slide, but it does
5 depict an illustrative viewpoint of what we're dealing with in
6 terms of past practices and how we got to where we are today.

7 Past practices, and we have the degraded habitat,
8 urbanization, forestry practices, agricultural practices. Just
9 more and more people coming into the habitats have degraded the
10 habitat, made them less functional to produce wild fish. Wild
11 fish in that production declined until the State of Washington
12 built one of the biggest hatchery systems, I believe in the
13 world, in terms of number of facilities. We have now state
14 facilities, tribal facilities, and federal facilities producing
15 hatchery fish to supplant and augment the wild fish population.

16 And in that process, the hatchery program was run -- or
17 hatchery fish became the brood stock for the hatchery program, so
18 those genes became part of those particular production. The
19 hatchery production became really large, especially for
20 Steelhead, Coho, and Chinook. Pink and Chum, not so much. Just
21 those main three species. So hatchery fish really dominated the
22 harvest. That's what they were designed to do, and they did a
23 very good job of that.

24 Where the harvest came in, the harvest was focused on total
25 abundance. And in some cases, the harvest rate on these fish

1 almost got to be the point of being 80 percent or so. So in that
2 high harvest, we took an awful lot of the wild fish in that
3 harvest rate, as well as the hatchery fish, which was basically
4 the intent to harvest.

5 So we've got -- in that particular process, the wild fish
6 spawners began to decline, which led to fewer fish on this
7 degraded habitat, and a lot of the habitats in the state of
8 Washington now have a dominance of hatchery fish in their
9 particular systems. So that's the past. That's what we've been
10 developing over the last 50 or 60 years. It's a way of saying
11 that that's got us to where we are now with the listings in Puget
12 Sound and elsewhere. It's, again, a depiction of where we've
13 come. And I think it gives you an illustration of why we need to
14 address the four Hs, and this one is depicting why the habitat,
15 the hatchery, and the harvest component of those.

16 Q How do state-owned fish passage barrier culverts fit into the
17 past that you've just described?

18 A Well, I believe that they naturally fit into the degraded
19 habitat portion of this. They basically are responsible for
20 taking out various quantities of functional habitat in the
21 various watersheds. And it's something that's happened over a
22 period of time. In some watersheds, it's severe, and in other
23 water sheds it's not severe. But basically they are a component
24 of the degraded habitat.

25 Q I just put up a slide called "Future." Would you please

1 explain what this slide depicts?

2 A Certainly. In my particular viewpoint, we need to get to the
3 portion of restoring habitat. I think everybody agrees that
4 restoring habitat is a key component. That's one of the four Hs
5 of addressing the restoration of fish in the watersheds.

6 We need to provide room in the habitat for wild fish here to
7 spawn. And in the future, the wild fish in these particular
8 watersheds would be the primary number of fish dealing with the
9 spawning capacity of that particular watershed. Hatchery fish
10 will be less important in terms of streaming into those
11 particular spawning grounds, and wild fish would make up the
12 dominating, as they were in the distant past -- the dominating
13 fish type in these particular watersheds.

14 And if we can get to that particular point, we'll always have
15 the wild fish genetics that will help drive the genetics of the
16 hatchery fish, so the hatchery fish will become more akin to what
17 the wild fish genes are all about, because they will dominate the
18 number of eggs and sperm going into those particular programs.

19 The next side of it -- because I think, by the way, that
20 hatchery fish -- and there is some disagreement here -- hatchery
21 fish will always be part of our environment here in the state of
22 Washington simply to provide a lot of the harvest that needs to
23 go on on those particular species, be they Chinook, Coho, or
24 Steelhead.

25 Now, the interesting part of all this is that you have

1 harvest now focusing more on the hatchery origin fish. It's my
2 belief that the wild fish, even in a sustained habitat, may be
3 able to withstand something like 30 percent harvest rate, 20 to
4 40 percent, not nearly what was the harvest rate of nearly 60 to
5 80 percent in the past.

6 However, we like to have harvest rates on the hatchery fish
7 closer to 90 percent because we need to make sure that those
8 hatchery fish no longer spawn on the water's edge in Puget Sound
9 streams and rivers. So harvest would be more directed towards a
10 hatchery-origin fish and less directed towards the wild fish, as
11 we allow more of those wild fish spawners back onto the restored
12 habitat.

13 So the cycle would continue in terms of a gravel-to-gravel
14 cycle, where wild fish would basically dominate each one of these
15 particular cycles, as they did in the past. So you have restored
16 habitat, you have hatchery reform, which basically gets at the
17 idea of having hatchery fish, drives the genetics of the
18 programs. We have harvest reform, more focus on hatchery-origin
19 fish, less on the wild fish, and basically the cycle can continue
20 into the future.

21 And out of that, you get a wild fish population that is
22 sustainable for the future, a wild fish population that would
23 enable us to say that the populations are restored, we'll have
24 harvest, and these wild fish populations will be able to exist
25 without the hatchery programs. And that's what's called a

1 restored and, I think, an unlisted fish population.

2 Q Have you written any newspaper editorials that describe your
3 vision of salmon recovery?

4 A I have over the years, yes.

5 Q Would you please turn to Exhibit W-085-J?

6 A Yes.

7 Q Is Exhibit 085-J one the editorials that you have written?

8 A Yes.

9 Q Do you still agree with it?

10 A I do.

11 Q Do you adopt Exhibit W-085-J as part of your testimony today?

12 A Certainly.

13 Q Would you please turn to Exhibit W-085-K?

14 A Okay.

15 Q Is Exhibit W-085-K one of the editorials you have written?

16 A Yes, it is.

17 Q Do you still agree with it?

18 A Absolutely.

19 Q Do you adopt Exhibit W-085-K as part of your testimony today?

20 A I do.

21 MS. WOODS: Your Honor, I would like to offer Exhibits
22 W-085-J and W-085-K for admission into the record.

23 MR. STAY: Your Honor, these were the two exhibits that
24 we objected to. They're obviously hearsay. But more than that,
25 I believe that they're not even a complete rendition of what

1 Dr. Koenings submitted to the local paper. This is what their
2 editorial board saw fit to put into the press.

3 If I've misstated, then I know Dr. Koenings will tell me that
4 I'm wrong, but I believe I'm correct; therefore they're not a
5 government record, they're not a public document, they're not
6 complete. They should not be introduced. There's no exception
7 to the hearsay rule.

8 THE COURT: Ms. Woods?

9 MS. WOODS: Dr. Koenings has just stated that he adopts
10 the statements in those two editorials as his testimony today, so
11 they become his sworn testimony today.

12 MR. STAY: The testimony was created in April, not in
13 October, your Honor. We are here to summarize the testimony, not
14 to create it.

15 THE COURT: All right. Counsel, here's what I will do.
16 Let's reserve on J and K until cross-examination. All right?
17 By Ms. Woods:

18 Q Dr. Koenings, you've just described your vision of the
19 future. With respect to the hatchery H, has the State of
20 Washington been doing anything to make the future a reality?

21 A Yes. In the state of Washington, as I said when I began my
22 testimony, we've been involved in salmon recovery and addressing
23 the four Hs. So one of the Hs that we've had to address is
24 hatchery and hatchery reform.

25 And in the state of Washington, we have a congressionally

1 driven hatchery scientific review group that has basically
2 reviewed the hatchery programs throughout the state and has come
3 up with a series of recommendations for us to follow to reform
4 our hatchery systems to more or less comply with the future
5 conditions as I laid it out.

6 In the rough, it's correspondence, not letter to letter, but
7 basically that's the particular focus of the hatchery reform. So
8 we have been in the process of trying to implement those kinds of
9 recommendations. There are something like over a thousand
10 recommendations, I believe, in the Puget Sound area, and we've
11 done, as co-managers, maybe 800 of those. Don't hold me to the
12 exact figure, but a bulk of them.

13 But in a lot of cases what's remaining are the more expensive
14 and more elaborate fixes, if you will. And we've been seeking
15 funding over the years to get those fixes put in place, and we
16 slowly are getting some funding to do that, but it's not
17 sufficient to make a very big dent in what we need to do in terms
18 of hatchery reform.

19 Q Dr. Koenings, at the outset of your testimony, you said you'd
20 just gotten back from Sitka from a Pacific Salmon Commission
21 meeting. The Pacific Salmon Commission, I believe, is set
22 up under a treaty between the United States and Canada; is that
23 right?

24 A That's correct.

25 Q Do fisheries in Canada affect salmon that spawn in Washington

1 rivers?

2 A Yes, they do.

3 Q I just put on the screen Exhibit W-085-L. What does this
4 slide depict?

5 A It depicts basically what the salmon commission is all about
6 in terms of one of the species it manages. This is the average
7 annual Chinook catch in those various fisheries up and down the
8 coast from southeast Alaska to Washington and Oregon.

9 It represents the stocks of origin in those particular
10 fisheries. So as you can see, from southeast Alaska, from a
11 catch of about 460,000 Chinook, they are made up primarily of
12 stocks that are not produced in Alaska. A lot of those are
13 produced in British Columbia and a lot are produced in the state
14 of Washington and Oregon.

15 So the treaty was set up to basically figure out how do we
16 conserve these stocks, given this catch history up and down the
17 coast of different entities catching each other's fish. So
18 that's a part of the treaty that deals with the conservation,
19 trying to prevent what we call overfishing.

20 The other part is trying to figure out how do we get to
21 optimum production in those particular -- for these particular
22 stocks. And optimum production basically deals, in our language,
23 with what's called non-fishing factors. So the commission is
24 increasingly becoming involved in trying to understand and deal
25 with what's going on with habitat and the natural stock

1 production in various watersheds that affect their fisheries.

2 So we are heavily involved of course in the management, but
3 we're also dipping our toe in the lukewarm water of salmon
4 restoration and trying to learn from the different entities how
5 best to do and how we could help in the salmon restoration
6 picture.

7 Now, one of the things I want to point out is that I
8 mentioned earlier for the Nooksack, you see being basically
9 harvest outside the state of Washington. Most of the harvest on
10 the Nooksack and a lot of the Puget Sound fish occurs in these
11 two fisheries in Canada.

12 And we have an international treaty, but that treaty doesn't
13 reduce -- can't reduce the harvest to a sufficient degree to say
14 that we've got harvest under control in the Nooksack River
15 system. But the co-managers have been adamant that in our
16 particular fisheries, we've basically cut that impact on those
17 particular fish down to basically nothing. So it goes back to
18 the fingerprinting in the various watersheds.

19 If you can't reduce the mortality through harvest
20 restrictions and -- because of the international nature of these
21 fisheries, how do you boost the survivorship of those fish in the
22 freshwater or in the portion of the system that we can deal with?
23 So that's how you get off in terms of a trade-off between the
24 various Hs, depending on what factor is affecting which H.

25 Yes. This is a depiction of how Chinook salmon are caught up

1 and down the coast.

2 Q Has there been any effort to persuade Canada to reduce its
3 catch of Washington and Oregon Chinook?

4 A Yes. We've just completed another ten-year agreement that
5 includes a 30 percent reduction of Canada's catch off the west
6 coast of Vancouver Island here, which basically has a lot to do
7 with Puget Sound stocks of Chinook.

8 And we've also had a 15 percent reduction in basically the
9 Chinook catch in the southeast Alaska system, primarily having to
10 do with their catch of Canadian-origin fish. That enables
11 Canada, therefore, to turn around and cut their catch on the west
12 coast of Vancouver Island so that we have more fish coming back
13 to the spawning grounds in Washington and Oregon to fulfill our
14 responsibility to basically restore those fish populations under
15 the ESA.

16 Q When was that ten-year agreement executed?

17 A It was signed last year, basically in December.

18 Q Is it currently in effect?

19 A It is.

20 Q Did you see any result of it during the fishing seasons in
21 2009?

22 A Yes. I think we saw -- it's hard to tease out in one year,
23 but I think we saw the results of some of the harvest
24 restrictions off the west coast of Vancouver Island deliver more
25 fish back to Washington and Oregon.

1 THE COURT: Counsel, I want to make sure I understand
2 this slide. Doctor, the way I understand this particular slide
3 is that the legend on the left shows where the fish come from.

4 THE WITNESS: Yes.

5 THE COURT: Where the stock of this Chinook comes from.

6 THE WITNESS: Stock of origin, yes.

7 THE COURT: And then the circles that are on the main
8 portion of it show the catch size and how that is composed, where
9 those fish come from, correct?

10 THE WITNESS: Yes.

11 THE COURT: Doesn't differentiate between hatchery fish?
12 wild fish? It doesn't matter?

13 THE WITNESS: It does not.

14 THE COURT: Thank you.

15 By Ms. Woods:

16 Q All right. Dr. Koenings, we've been talking about the
17 harvest H and a little bit about the habitat H.

18 What's happening in the state of Washington, and particularly
19 in the case area, with respect to the habitat H?

20 A Well, the co-managers, as I indicated earlier, took a very
21 proactive step in terms of dealing with recovery plans in the
22 various watersheds, dealing with Chinook in particular. The
23 co-managers had a very large part to play in developing recovery
24 plans.

25 When we started this endeavor in 1998, 1999, the State set up

1 local watershed groups in these particular watersheds that were
2 to help write recovery plans. So the watershed groups called
3 "lead entities" have been fully functional through that
4 particular time, helping to write the recovery plans for listed
5 fish and their watersheds.

6 We've also had other groups, called Regional Fish Enhancement
7 Groups, that are watershed groups that do habitat restoration
8 work and other work dealing with the fish in the watersheds as
9 well. Now, these are groups that are made up of volunteers that
10 do like boots-in-the-water kind of work, but they're official
11 volunteers for the State of Washington. And these programs are
12 administered either by the Department of Fish and Wildlife or
13 more recently by the recreation and conservation office. So they
14 are what the legislature envisioned to be the primary vehicles of
15 doing habitat restoration, the actual work, and proposing
16 projects to get funded.

17 Now, the project funding part of it was supposed to occur
18 through the Salmon Recovery Funding Board. The Salmon Recovery
19 Funding Board gets its allocations from the federal budget and a
20 25 percent match from the state budget. And the funding board
21 takes projects coming out of the watersheds that are recommended
22 by the watersheds and funds those basically habitat restoration
23 projects, more recently according to the plans that were
24 submitted and approved by NOAA.

25 So that's sort of a nutshell in terms of how the restoration

1 work is occurring. And you can see in this particular diagram,
2 which comes out in the State of the Salmon Report, the latest
3 State of the Salmon Report, looking at some of the, again,
4 habitat-related issues that have been addressed in the various
5 ESUs in the watersheds. So you know, we're making some progress,
6 and the progress is in a variety of different components of the
7 overall habitat.

8 You have to -- again, as NOAA would define it, you have to
9 address the main attributes of the limiting factors in order to
10 recover the fish populations in each one of these particular
11 sectors. So there are multiple factors that need to be
12 considered. And what this shows is just basically the progress,
13 and it's a depiction and it's a summary of addressing each one of
14 these components as part of our overall strategy in the state of
15 Washington.

16 So it shows the average progress in terms of addressing the
17 various issues that are responsible for the salmon populations
18 being diminished in each one of these watersheds. And you can
19 see that they're at varying degrees of basically being addressed,
20 depending on what are some of the factors in the various
21 watersheds that need to be addressed.

22 So we think we've made progress, and the progress is not
23 sufficient to recover the fish at this point in time, but
24 progress is being made.

25 Q How does climate change factor into all of this?

1 A Well, that's a subject that is increasingly on everybody's
2 mind dealing with natural resource issues, be they fish issues or
3 be they wildlife issues, plant issues, whatever.

4 Climate change is, in my opinion, clearly upon us. And it's
5 increasingly evident from the fish managers' point of view that
6 it's putting into the picture of fish management a lot of
7 uncertainty relative to fish production and the fish production
8 models that we've used in the past.

9 An example of that would be the recent discussions on the
10 Fraser River system in Canada, where they had basically this year
11 a total run collapse, despite the fact that they put out near
12 record numbers of Sockeye out of that freshwater habitat. None
13 of the fish came back. So instead of a harvest anticipated
14 between 6 and 8 million, there was very little harvest, very
15 little harvest in terms of the tribal and non-tribal fisheries.
16 Basically, it was a disaster.

17 But the idea here in terms of people that have looked at
18 that, the uncertainty being introduced by climate change in terms
19 of thermal regimes is going to make forecasting and being -- in
20 terms of accuracy of forecast, problematic for fish managers into
21 the future. As yet, we don't have tools to incorporate the
22 elements of climate change into our models we use to manage
23 fisheries. So more and more, we're going to be less certain
24 about how many fish are basically coming back to our systems,
25 just because of the varying degrees of influence of climate

1 change and the thermal regimes out in the ocean.

2 Q If you would please turn to Exhibit W-085-H in the binder
3 before you.

4 A Yes.

5 Q Do you recognize that?

6 A Yes, I do.

7 Q What is it?

8 A It is my testimony to the United States senate conference,
9 Science and Transportation Committee at a field hearing in
10 Seattle, Washington.

11 Q What's the topic of the testimony?

12 A I don't really have a topic. The topic I was dealing with,
13 in terms of a topic sentence, was impacts of climate change in
14 Washington State's marine ecosystem. And again, I can sum this
15 topic up with one word: Uncertainty.

16 Q Do you still agree with the statements that are in Exhibit
17 W-085-H?

18 A I certainly do. I think, given what we've learned since
19 putting this together, I would have been more definitive, if you
20 will, in terms of using the one word, "uncertainty." It's
21 becoming increasingly clear, talking with fish managers up and
22 down the coast, that that is one of the code words they're using
23 now. It's just less certain in terms of what we're getting out
24 of our fisheries.

25 Q Do you adopt Exhibit W-085-H as part of your testimony today?

1 A Yes.

2 MS. WOODS: I'd like to move for admission of Exhibit
3 W-085-H into the record.

4 MR. STAY: We have no objection, your Honor. There's no
5 need to adopt it as his testimony. We have no objection to the
6 exhibit as it stands.

7 THE COURT: Exhibit 085-H is admitted. Thank you,
8 Mr. Stay.

9 By Ms. Woods:

10 Q Dr. Koenings, if the Court were to order the State to make
11 the correction of state-owned fish passage barrier culverts the
12 first priority in all watersheds in the US v. Washington case
13 area, would that upset the apple cart for salmon recovery?

14 MR. STAY: Objection, your Honor. Form of the question,
15 "we."

16 THE COURT: Overruled.

17 You may respond.

18 THE WITNESS: Thank you.

19 Well, that's a good question, and my answer is related to my
20 testimony, is that in addressing salmon recovery, there's a
21 multitude of different factors that need to be addressed, in my
22 opinion on a concurrent path. And those concurrent paths deal
23 with the four Hs. Those concurrent paths deal with how you
24 fingerprint in the various watersheds how those various H's come
25 together to form a recovered salmon population.

1 With today's budgetary climate, both in terms of the
2 legislature and otherwise, I think there is a limited amount of
3 money to deal with that over time. And if those concurrent paths
4 aren't followed in a comprehensive fashion, I think it will delay
5 salmon recovery and make it more costly into the future.

6 So I think fixing the blocking culverts is certainly an
7 important part of overall salmon recovery. There's no question
8 about that. But my concern is using what I call inordinate
9 amounts of money to put into that when we haven't really
10 determined what is the best fingerprint for the different
11 watersheds to go by in terms of recovering the fish.

12 So my answer to that is we put together a hugely, I think,
13 successful model of doing salmon recovery in the state of
14 Washington. It is something that's being copied in other parts
15 of the state -- other parts of the nation, I should say, as a
16 real way of getting things done. It's a collaborative process
17 that we've set up.

18 So we've got a system in place. I think it's working, and I
19 think from the documentation today we'll see there are advances
20 being made for the various populations. I think keeping that in
21 place is extremely important for the future, especially given
22 where climate change is taking us in terms of the increasing
23 uncertainty in dealing with these particular issues.

24 By Ms. Woods:

25 Q If a big pile of salmon recovery money fell out of the sky

1 today, how would you spend it?

2 MR. STAY: Your Honor, I object. There's no foundation
3 for large or small piles of money falling from the sky.

4 THE COURT: Because I am dying to hear his answer, I'll
5 overrule the objection.

6 And here's my question. I understand about the four Hs, but
7 doesn't it all start with habitat? Without the available
8 habitat, don't the other three Hs become less relevant?

9 THE WITNESS: It certainly is a starting point, but I
10 would answer it in this manner. You need habitat, certainly
11 functional habitat, for the natural wild fish we're trying to
12 recover. But at the same time, if in -- I think in -- let's see,
13 there's only four watersheds of the 22 in Puget Sound, as an
14 example, where hatchery fish don't dominate the fish in the
15 spawning grounds, i.e., into the river systems.

16 Now, in some cases, those fish are out-of-basin fish that are
17 not adapted to those particular watersheds. They are hatchery
18 origin stocks. So if you open up additional habitat and you have
19 this swamping effect of hatchery fish, which could be
20 out-of-basin fish, you may be doing more harm in the long term in
21 terms of trying to reduce the impacts of those fish to the wild
22 fish than you would be in terms of enhancing the wild fish
23 production by opening that habitat.

24 So my particular point of view is you need to have hatchery
25 reform deal with a number of hatchery fish. And that would, in

1 essence, increase or synergize, if you will, the effects of
2 opening up the habitat. To get the hatchery fish off the
3 spawning grounds, you have to reform the harvest so that the
4 harvest takes most of the hatchery fish out of being able to get
5 back to the spawning grounds over time. So there's a cycle here
6 and a sequence that needs to be maintained so that that habitat
7 that's being opened up actually is producing the right number of
8 fish to basically get to where we want to go in terms of our
9 future condition. I hope I didn't confuse you more than I want
10 to.

11 THE COURT: Help me maybe with a more basic question.
12 You have a hatchery fish; you have a wild fish.

13 THE WITNESS: Yes.

14 THE COURT: Same species.

15 THE WITNESS: Yes.

16 THE COURT: They can mate, interbreed, whatever, spawn
17 together.

18 THE WITNESS: Exactly.

19 THE COURT: They both go out to the ocean, they both
20 come back to the same spot. What are their offspring?

21 THE WITNESS: Well, they're fish. We consider a wild
22 fish a fish that completes the gravel-to-gravel migration. So if
23 that fish, that hybrid, if you will, comes back and spawns, their
24 progeny is considered wild fish because they would complete the
25 gravel-to-gravel cycle.

1 The problem that we're getting into with hatchery fish,
2 especially fish that come from out of basin, is that the genes
3 and the ability of hatcheries to drive the genetic drift, if you
4 will, away from endemically evolved fish is deemed by NOAA
5 fisheries and other fishery scientists as being detrimental to
6 being able to attain the recovery of the natural fish population.

7 So what we need in terms of these hatchery fish is to have
8 the wild fish over time begin to drive the genetics of the
9 hatchery fish so that you don't get that negative effect of
10 hatchery fish in a restored wild fish population. So that's why
11 those particular components need to operate concurrently to be
12 able to get the biggest bang for the buck, in my viewpoint.

13 THE COURT: That brings us back to Ms. Woods' question.
14 If you had that bushel of money, how would you spend it?

15 THE WITNESS: Well, one thing that I would do,
16 certainly, and the starting point, is we have comprehensive ways
17 of looking at habitat restoration. We have the recovery plans.
18 We have a comprehensive way of looking at harvest. And that's
19 the comprehensive harvest plan for Chinook that the co-managers
20 have put together and adopted by NOAA. We have the
21 recommendations of the hatchery scientific review group in terms
22 of dealing with the hatchery H. I'm going to leave the
23 hydropower because that doesn't really enter into the equation
24 that much.

25 So we have these comprehensive reviews that have gone on and

1 have said, We need to do these things. In my view, the first
2 thing is to have a comprehensive look of integrating all those Hs
3 and the processes connected to them into one particular way of
4 looking at fingerprinting the watersheds. In other words, how do
5 those comprehensive uses fit together to give you the best bang
6 for the buck for salmon recovery.

7 Integrating into the watersheds would allow you to
8 fingerprint which part of the H needs to be done at which
9 particular point in time, and how they all fit together in the
10 watersheds will become much clearer than they are right now. In
11 some cases, you have people competing for funds because they want
12 to address one H over the other H, and there just isn't that much
13 money to go around to do that.

14 In my particular view, and the co-managers in the state of
15 Washington have been trying to do this, we just haven't had the
16 money and the personnel to get it done, given all our other
17 responsibilities, is to begin to form an integrated look to what
18 needs to be done in each one of the watersheds so we have a
19 comprehensive plan of moving forward. That would be the starting
20 point, and then you could take your bushel of money and begin to
21 apply it to those particular priority needs.

22 That would be, if I were ruler of the world for ten minutes,
23 my view of it.

24 THE COURT: In your opinion, that is not occurring right
25 now?

1 THE WITNESS: In my opinion, that is not occurring to
2 the degree that it needs to occur. That's correct. It has not
3 been done on a systematic basis.

4 THE COURT: And when we talk about that integrated look,
5 I'm sure you are including the tribes as well?

6 THE WITNESS: Absolutely. Oh, absolutely. Again, we've
7 been trying to do this. We just haven't been able to get to it.

8 THE COURT: Ms. Woods?

9 MS. WOODS: I have no further questions at this time,
10 your Honor.

11 THE COURT: Cross-examination, Mr. Stay?

12 MR. STAY: Thank you very much, your Honor.

13 CROSS-EXAMINATION

14 By Mr. Stay:

15 Q Nice to see you, Dr. Koenings.

16 A It's a pleasure to be here. We've done this before.

17 Q Haven't we, though?

18 You're not an engineer, are you, Dr. Koenings?

19 A I am not.

20 Q Nor are you a hydrologist?

21 A I am not.

22 Q So you're not an expert in the design or operation of
23 culverts?

24 A I am not.

25 Q As I understand it, there is -- we have limited factor

1 assessments now in all of the watersheds?

2 A We do.

3 Q Those LFAs, are they sort of the basis for making priority
4 decisions in these watersheds?

5 A I think they form one of the bases for making those kinds of
6 decisions. They were done almost ten years ago. Circumstances
7 may have changed, but yes, they certainly are a starting point, I
8 think, of making a lot of determinations on habitat restoration
9 efforts in the watersheds.

10 Q Do we have any other watershed assessments similar to the
11 LFAs in the case area?

12 A There could be, but they're the most comprehensive dealing
13 with the case area.

14 Q And we know for a fact that barriers are a limiting factor --
15 a major limiting factor for Chinook recovery, don't we?

16 A They are one of many.

17 Q You would not use the word "major"?

18 A In some watersheds, I would use the word "major." In other
19 watersheds, I would not use the word "major."

20 Q If you could look at Exhibit N to your declaration, which is
21 a statewide strategy for salmon recovery.

22 A Yes.

23 Q And if you look at Page 13 --

24 A Where are we now? I'm sorry.

25 Q I'm sorry. We're in Exhibit N, which, your Honor, is

1 entitled "Statewide Strategy to Recover Salmon."

2 And I'm now going to Page 13.

3 A Hang on. Page 13.

4 Q And the left-hand column?

5 A Yes, sir.

6 Q It says -- am I reading this correctly when I read it, "Major
7 Factors Limiting Recovery"? It's in red.

8 A Yes.

9 Q And the last one there is "Barriers to Fish Passage"?

10 A Correct.

11 Q I'm reading that correctly?

12 A You are.

13 Q Thank you. Am I correct -- I'm not a biologist, and you know
14 that, Dr. Koenings, so if I misstate -- I'll try not to.

15 The salmon species, they have different life histories?

16 A Correct.

17 Q And therefore they'll need different kinds of habitat or
18 natural conditions for their survival?

19 A They have some in common, but, yes, they do differ because
20 they're different species, that's correct.

21 Q This is an aside. We talk about fixing blocking culverts to
22 pass fish, but am I right that another reason for doing that,
23 independent of fish passage, would be to facilitate the movement
24 of wooden sediment?

25 A I would believe so, yes.

1 Q Now, we have recovery plans in the Puget Sound area for
2 Chinook and Hood Canal Chum. Am I correct?

3 A Yes.

4 Q We do not have recovery plans for Puget Sound Coho. Am I
5 right?

6 A That's correct.

7 Q Nor do we have recovery plans for Pink in Puget Sound?

8 A True.

9 Q Now, we do have a recovery plan for Sockeye in Lake Ozette?

10 A Yes. That's our favorite subject we talk about, yes.

11 Q But we don't have a similar one in Puget Sound?

12 A That's correct.

13 Q And the species that we have recovery plans for are all
14 listed under the Endangered Species Act, right?

15 A Yes. On the other hand -- I just want to be clear.

16 Q This is your one chance. Go ahead.

17 A All right. Thank you, Alan.

18 Coho in Puget Sound, although they're not listed, they are a
19 stock of concern for NOAA. I just wanted to make sure to say
20 that.

21 Q Now, in these recovery plans, there's no requirement that any
22 of these recovery plans be implemented. Am I correct?

23 A Yes.

24 Q Now, recovery plans, they're not intended -- they're intended
25 for a target species, even though they have may ancillary or

1 indirect effects on other species. Am I correct?

2 A In my view of it, yes, they are designed for one species.
3 The overall effect is to do the watershed health, which is the
4 indirect effects you mentioned.

5 Q Now, I know you're not an expert on culvert design, so if I
6 ask you this question and it's outside your expertise, please
7 tell me.

8 In selecting a culvert design method, you would want to use
9 the best methodology that has been developed, the best available
10 science in selecting the culvert design to correct the blocking
11 culvert. Would you agree with that statement?

12 A I would agree with it from the point of view that given the
13 circumstances at hand, and those circumstances vary, you would
14 want the best fix possible.

15 Q Now, you were the director of the Department of Fisheries for
16 ten years?

17 A Department of Fish and Wildlife for ten years.

18 Q Pardon me. Department of Fish and Wildlife. That's how old
19 I am.

20 The Department of Fish and Wildlife does not fund the
21 correction of the Washington Department of Transportation barrier
22 culverts, does it?

23 A I don't believe so, no.

24 Q If a culvert is blocking habitat that is susceptible to being
25 made functional, that culvert would be a candidate for

1 correction, would it not?

2 A Repeat the question.

3 Q Certainly. If we have a culvert that blocks habitat --

4 A It's blocking currently?

5 Q It's blocking.

6 A Okay.

7 Q And that habitat is susceptible to be made functional, would
8 that culvert be a candidate for correction? I'm not prioritizing
9 now. I'm just saying, is it a candidate?

10 A I would say that if it can be made functional for fish
11 production, yes, it would be suitable for being a candidate for
12 replacement and repair.

13 Q Now, in your direct testimony with Ms. Woods, you talked
14 about the Salmon Recovery Funding Board.

15 That's called a SRF Board?

16 A Correct.

17 Q And you also talked about the Regional Fishery Enhancement
18 Groups?

19 A RFEGs, correct.

20 Q RFEGs. I got from your testimony that you thought that these
21 two mechanisms are central to the recovery, as you see it, in the
22 Puget Sound?

23 A Yes. They're one of the main ingredients in terms of the
24 State's vision of how to address salmon recovery.

25 Q Let's start with the Salmon Recovery Funding Board, the SRF

1 Board. It's a funding entity, correct?

2 A Correct.

3 Q And how it gets projects is that a local watershed group will
4 suggest projects, and then those projects will go forward to the
5 SRF Board, and then they may or may not be funded, as the SRF
6 Board decides?

7 A That's correct, but there's a number of steps that you left
8 out in terms of the process that are, I think, key to what gets
9 funded.

10 There's scientific scrutiny. There's the scrutiny of the
11 tribes' and the department's biologists, and they make
12 corrections and recommendations to be able to say that this
13 project will help the fish in the particular watersheds. And
14 they go up through a citizens' advisory board, and they get
15 looked at in terms of how it fits into the watershed group's
16 vision of moving forward, the lead entity. And the lead entities
17 advance those projects that meet certain criteria to the SRF
18 Board for funding.

19 Q Okay. So we've got a local group down in Nisqually, the lead
20 agency?

21 A Yes.

22 Q We have a local group on the Nooksack with a lead agency.
23 And they develop projects which they believe are important for
24 their particular watersheds?

25 A Particularly in the habitat component.

1 Q That's what I'm talking about. I'm leaving the other Hs out.

2 A Okay. I just wanted to make sure that we --

3 Q This is a one-H discussion. Habitat only.

4 A Thank you.

5 Q And then they will go to the SRF Board, and then they will
6 fund them or not fund them?

7 A That's one path of getting projects funded, that's correct.

8 Q And the Washington Department of Fisheries, it doesn't have
9 any approval function with respect to what the SRF Board funds;
10 is that correct?

11 A No. And we have an advisory seat, if you will, on the SRF
12 Board.

13 Q But you don't have any approval function?

14 A No.

15 Q And you're not a voting member on this board?

16 A Correct.

17 Q So as you -- not you, the Department of Fish and Wildlife,
18 sits there managing the fisheries, we have various local groups
19 which are proposing projects to the SRF Board, and there's no
20 coordination. You don't coordinate because you don't have any
21 role on the SRF Board; is that correct?

22 A I don't have a role on -- the department's role on the SRF
23 Board is advisory, so we don't make the decision. But I would
24 back up a bit and say we have scientific input in terms of the
25 projects moving forward at the local level before they get to the

1 SRF Board. So they have been scrubbed by a couple of different
2 groups dealing with are they going to be effective for the fish
3 in the watersheds.

4 Q Effective in that watershed?

5 A Exactly.

6 Q But not effective with respect to the grand scheme of what
7 should be going on in Puget Sound?

8 A They are following, I believe, the recovery plans that were
9 developed for those watersheds, yes.

10 Q And the recovery plans we have are for Chinook; is that
11 right?

12 A One species, yes.

13 Q Well, we have no other recovery plans in Puget Sound except
14 for Hood Canal Chum.

15 A Okay. Thank you.

16 Q I got there. But for Coho or Pink or Sockeye, these are just
17 independent bodies putting together, for the sake of argument,
18 goods plans for their particular watershed, and they're going to
19 go up, and they get funded or not?

20 A That's true. You recall earlier, Alan, that this is a Salmon
21 Recovery Funding Board, it's not the listed salmon recovery
22 funding board, so they fund projects in the areas where there are
23 not listed fish.

24 Q But the only coordinating plan is the recovery plans, and we
25 don't have recovery plans except for listed fish.

1 A We have recovery plans for listed fish, but we also have
2 projects that deal with unlisted fish because the SRF Board is
3 designed to preserve the baseline for these fish as well as
4 recovering those fish through restoration projects.

5 So there are projects funded that aren't basically dealing
6 with listed fish, but they have to be stocks that are in trouble.
7 I mean, that's why it's called the recovery board.

8 Q The regional fisheries enhancement group, they're local
9 volunteer groups too. Am I right?

10 A You're right.

11 Q And they're a basic nonprofit corporation? I believe that's
12 how they're set up?

13 A I believe so.

14 Q And they also can submit funding requests to the SRF Board?

15 A Yes, through the lead entity process.

16 Q You would agree with me that the success -- well, would you
17 agree with this statement, "Individual donations and in-kind
18 contributions from local community members" -- excuse me, "and
19 businesses are essential to the success of each RFEG"?

20 A I think there are some that would rely on those sources of
21 funding, and there are others that don't rely on those sources of
22 funding. And the reason I say that, there are administrative
23 funds that flow from the state and the federal government to
24 these groups to enable them to function administratively. So the
25 existence or nonexistence, depending on other sources of funding,

1 it depends.

2 Q Would you look at Exhibit O to your declaration?

3 A There it is. I've got it.

4 Q Would you look at that first page?

5 A Yes.

6 Q Look at the one, two, three, fourth paragraph.

7 A Okay. I'm on the second page, then.

8 Q Excuse me.

9 A Page 3?

10 Q It says Page 3, right.

11 A Okay.

12 Q And the one, two, three, fourth paragraph?

13 A Yes.

14 Q Could you read that first sentence for me?

15 A Sure. "Individual donations and in-kind contributions from
16 local community members and businesses are essential to the
17 success of each RFEG."

18 Q Thank you. We talked about science a minute ago. Now, I
19 want you to think on this carefully. Would you agree with me
20 that science is not the controlling factor on what the citizen
21 advisory groups will do? Do you agree with me on that?

22 A Yes. It informs decisions. It doesn't make decisions.

23 Q Thank you. In your declaration on Page 25 -- I think it's
24 Paragraph 53, but I wrote 534 on my notes.

25 A Could be. It seems that long.

1 Q It does, doesn't it? But we're almost done. We're almost
2 done.

3 A Do you want me to go to it?

4 Q No. I think you'll remember it. If we need to go to it, we
5 will.

6 In there, you say, "We have already fixed the cheapest" --
7 "the easiest and cheapest fish passage barriers."

8 Do you remember that?

9 A Yes.

10 Q Ms. Woods asked you about that this morning. In making that
11 statement, you relied upon people in your office. Am I right?

12 A The experts in the field, that's correct.

13 Q And you did not go out and do any independent analysis or ask
14 any independent professionals with respect to the veracity or
15 truthfulness of that statement; is that correct?

16 A I did not.

17 Q The Department of Fish and Wildlife enforces a hydraulic
18 code; am I right?

19 A Correct.

20 Q And do you recall ever taking an enforcement action against
21 the Washington Department of Transportation?

22 A I don't recall. And this is where we're dealing with the HPA
23 program, the hydraulic code and the HPA program, just to make
24 everybody aware of what we're talking about. Allison made
25 several references to the HPA program.

1 Q That's a program where if you're going to do things within
2 the water of the state of Washington, you need to talk to you and
3 get a permit?

4 A Talk to the department personnel, that's correct.

5 Q I keep saying "you," but I use "you" in the global sense.

6 A I'm not that global.

7 Q I want to put on a Washington State statute. Can you see
8 that, Dr. Koenings? Is that clear to you?

9 A Not very well.

10 Q I'll represent this is Paragraph 3 of RCW 77.57.030.

11 Are you familiar with that paragraph I have highlighted?

12 A Yes.

13 Q That paragraph was added to the legislature in an effort to
14 reduce the Washington State Department of Fisheries' authority.
15 Am I right?

16 A Yes.

17 Q It was a response to an effort by the Department of Fish and
18 Wildlife to address a blocking tide gate in the Skagit drainage?

19 A Correct.

20 Q And the legislature acted to take that authority away by
21 amending the law?

22 A Correct. I'm getting nervous agreeing with you.

23 Q I've known you for 12 years, and you've never done it before.
24 I want to ask a question on recovery.

25 MR. STAY: Just a couple of questions, your Honor.

1 By Mr. Stay:

2 Q Would you agree with me that we would have recovery if we had
3 sustainable runs with some harvest?

4 A Yes.

5 Q And with respect to co-management, that's where you and I
6 have done most of our interacting, it's been mostly on harvest.
7 Do you see the co-management relationship that exists between
8 tribes and the department on harvest and hatchery issues being
9 the model that you would use for co-management with respect to
10 habitat issues?

11 A Not in its entirety, no.

12 Q And would the difference be that you would believe that
13 ultimately the State of Washington would have the authority to
14 make the decision with respect to habitat matters?

15 A I would make the statement, or characterize it a bit
16 differently, that it would have the responsibility as a sovereign
17 government and the responsibility of the tribes as sovereign
18 governments. And to maintain that sovereignty, there has to be
19 an entity that makes the decision, but I would characterize it
20 more as an informed decision by having the tribes be part of the
21 process to reach that decision.

22 But, yes, ultimately the State of Washington, I believe, is
23 the one to make that decision.

24 MR. STAY: Thank you, your Honor.

25 Thank you, Dr. Koenings. I am done. But I believe my

1 colleague, Mr. Monson, is not.

2 THE COURT: Mr. Monson, how many questions do you have?

3 MR. MONSON: Maybe five or ten minutes' worth.

4 Good morning, Dr. Koenings. Good morning, your Honor. Peter
5 Monson for the United States.

6 THE WITNESS: Good morning.

7 CROSS-EXAMINATION

8 By Mr. Monson:

9 Q We participated by telephone, so you might recognize me as
10 the black box from your deposition.

11 A I recognize the voice.

12 Q Okay. Very good.

13 I just have a relatively few questions to follow up on the
14 ones Mr. Stay had asked. In your direct testimony this morning
15 and in your report, you described the four Hs.

16 Do you recall that?

17 A Correct.

18 Q And you described both in your declaration and today your
19 past experience as the director of the Washington Department of
20 Fish and Wildlife?

21 A Correct.

22 Q And were you there for about nine years?

23 A Ten years.

24 Q And you dealt with budgets probably considerably. So you're
25 familiar with the sources of funding the Washington Department of

1 Fish and Wildlife receives?

2 A Yes.

3 Q And you're familiar with the places that it goes, where it's
4 spent?

5 A I'd like to think so. But over the years, I developed a
6 basic belief that I don't know as much as I should. But yes, I
7 do know that.

8 Q Now, in terms of the four Hs, let's turn to hatchery reform,
9 for example.

10 A Sure.

11 Q I will ask it this way. The Washington Department of
12 Transportation doesn't provide funding to the Washington
13 Department of Fish and Wildlife for hatchery reform, does it?

14 A Not to my knowledge.

15 Q And what about for harvest management; the same answer?

16 A Yes.

17 Q And for hydropower operations, would that be the same answer?

18 A I would believe so. I'm not quite sure.

19 At least in the case area. I'll put it that way.

20 Q Now, you spoke earlier about the SRF Board and its
21 relationship to the habitat component, the habitat H, if you
22 will.

23 Does the Department of Transportation contribute any funding
24 to the Salmon Recovery Fund Board -- or to the Salmon Recovery
25 Fund, I should say?

1 A No. I believe it comes out of separate appropriations from
2 the legislature.

3 Q Now, does the Department of Fish and Wildlife provide any
4 funds for any of the Hs to the Department of Transportation?

5 A I don't believe so. I'm not going to stand on that. There
6 could be some -- you know, at the staff level, some contracting
7 that goes on that I didn't know about. But basically, no.

8 Q To your knowledge, no?

9 A Yes.

10 MR. MONSON: Thank you, Dr. Koenings.

11 I have no further questions, your Honor.

12 THE COURT: Ms. Woods, how much redirect do you have?

13 MS. WOODS: Very little, your Honor.

14 REDIRECT EXAMINATION

15 By Ms. Woods:

16 Q Dr. Koenings, Mr. Stay asked you a few questions about the
17 Salmon Recovery Funding Board. Do tribes participate in the
18 local watershed groups?

19 A Oh, absolutely. Absolutely. They're a critical element of
20 it.

21 Q Does the Salmon Recovery Funding Board have a tribal
22 representative?

23 A A voting member, yes.

24 Q Mr. Stay also asked you some questions about Regional
25 Fisheries Enhancement Groups.

1 Do the tribes participate in those groups?

2 A I can't say for sure. I don't know why not, but I can't say
3 for sure whether they do or not.

4 MS. WOODS: That's all the questions I have, your Honor.

5 THE COURT: You are free to step down. Thank you.

6 All right, counsel, we'll go ahead and take our break for
7 noon. Please remember we will be starting a little bit later
8 this afternoon. Ms. Williams can fill you in on exactly what we
9 need to move around to get our other people in here for our
10 sentencing matter.

11 Have a great lunch.

12 (At this time, a lunch break was taken.)

13 THE COURT: Counsel, a couple of things. I appreciate
14 your help in allowing us to do that criminal matter.
15 Unfortunately, another criminal matter -- emergency criminal
16 matter has popped up that I'm going need to handle a few minutes
17 after four o'clock. That's the way my Fridays tend to go.

18 Here is what we'll do. We'll start our session now, have no
19 break, and go all the way until four o'clock, and we'll excuse
20 you guys at that point in time. All right?

21 One last thing regarding Dr. Koenings' testimony. The Court
22 has had a chance to review Exhibits J and K, 085-J and 085-K, and
23 I certainly understand from the plaintiffs' perspective that
24 these are articles, they were published in the newspaper, and
25 it's whatever the newspaper people decided to publish. But the

1 fact that Dr. Koenings indicated that he would stand behind those
2 statements, at least for whatever that's worth, the Court will
3 admit 85-J and 85-K.

4 And the State may call their next witness.

5 MS. WOODS: Your Honor, the State will call Brian
6 Benson.

7 THE COURT: Mr. Benson, I'll have you raise your right
8 hand and be sworn.

9 Whereupon,

10 BRIAN BENSON

11 Called as a witness, having been first duly sworn, was examined
12 and testified as follows:

13 THE CLERK: Please state your full name and spell your
14 last name for the record.

15 THE WITNESS: Brian Benson, B-E-N-S-O-N.

16 THE COURT: Mr. Benson, there's water on your left if
17 you need it.

18 You may inquire, Ms. Woods.

19 DIRECT EXAMINATION

20 By Ms. Woods:

21 Q Good afternoon, Mr. Benson.

22 A Good afternoon.

23 Q Mr. Benson, where do you work?

24 A I work for the Washington Department of Fish and Wildlife.

25 Q How long have you worked for the Washington Department of

1 Fish and Wildlife?

2 A Almost 29 years.

3 Q What are your current job responsibilities?

4 A Currently I'm an information technology specialist in the
5 science division, which is part of the habitat program. My job
6 responsibilities, I manage two fairly large natural resource
7 databases. It involves design, construction, maintenance,
8 updating, modifications. I'm responsible for creating and
9 maintaining the GIS products that come out of those databases.

10 Q How long have you been doing that type of work?

11 A Probably started in the early 90s.

12 Q Would you please describe your educational background?

13 A I have a Bachelor of Science in marine resources from Huxley
14 College of Environmental Studies at Western Washington
15 University.

16 Q Do you have experience as a fish biologist?

17 A I have held that position, yes.

18 Q With the Washington Department of Fish and Wildlife?

19 A That's correct.

20 Q Is that before you began the database work that you've been
21 doing now for a while?

22 A Yes, and kind of at the same time as well.

23 Q Mr. Benson, were you in the courtroom during the testimony of
24 Tyson Waldo?

25 A Yes, I was.

1 Q Do you recall him using the acronym FPDSI?

2 A Yes, I do.

3 Q What does FPDSI stand for?

4 A Fish Passage and Diversion Screening Inventory.

5 Q Is that a database?

6 A That is a database.

7 Q Who developed the Fish Passage and Diversion Screening
8 Inventory Database?

9 A I did.

10 Q Why did you choose the title "Fish Passage and Diversion
11 Screening Inventory"?

12 A Well, for one, it's reflective of the contents of the
13 database. Also, it is hard to pronounce. Most database
14 developers like to come up with names that have catchy acronyms,
15 and I don't particularly care for that.

16 Q Is it okay if I use it -- if I call it the FPDSI?

17 A Yes.

18 Q Would you please describe the history of the FPDSI?

19 A Well, the predecessors to the FPDSI probably originated in
20 the late 1980s and early 1990s. I started with the SHEAR program
21 about 1996, and there were several independent databases being
22 used to keep track of the various fish passage inventories and
23 fishway inspection projects. There was just an ad hoc kind of
24 table, essentially, that contained barrier information.

25 After I joined the division, we started the Thurston County

1 inventory, which had its own database, and then the Jefferson
2 County inventory, again, had a separate database. So in about
3 '97, '98 when we started working on the manual, we decided to
4 create a database to support the manual, and as part of that
5 process, we would incorporate all the other independent databases
6 into it. That database became known as SHEAR base, and it's
7 undergone several iterations over the years and finally ended up
8 being the FPDSI.

9 Q When you say "the manual," what are you talking about?

10 A That's the Fish Passage Barrier Assessment Manual.

11 Q Are you the person who currently maintains the FPDSI?

12 A Yes, I am.

13 Q What kinds of data does the FPDSI contain?

14 A It contains information on fish passage structures. It
15 contains some information on surface water diversions. Relative
16 to the fish passage information, it's got locational data. It's
17 got specific descriptors of the various types of fish passage
18 structures, whether they be culverts, dams, things like that, the
19 habitat information, and the priority index information.

20 Q Does the data change over time?

21 A It changes on virtually a daily basis.

22 Q And why is that?

23 A Well, it's an active database. We have a lot of work going
24 on with the DOT inventory crews. They come in and update and add
25 data weekly. I add data on a fairly regular basis from inventory

1 information coming in from non WDFW sources.

2 Q About how many records for fish passage structures does the
3 FPDSI have today?

4 A It has over 36,000.

5 Q About how many of those are human-made fish passage barriers?

6 A Around 11,500.

7 Q Of those 11,500, about what proportion are state owned?

8 A I guess it's just under 25 percent.

9 Q Does the FPDSI have records for every fish passage barrier in
10 the state of Washington?

11 A It does not.

12 Q Why not?

13 A Well, several reasons. There are a number of large data sets
14 that we don't have. We don't have DNR's data set incorporated.
15 We don't have the Forest Service data set. We don't have the
16 large commercial forest landowners information. There's just a
17 lot of private and local governmental culverts out there that
18 have not been assessed and inventoried.

19 Q Are the inventories for Washington State Department of
20 Transportation culverts complete?

21 A I believe they are.

22 Q Are the inventories for Washington Department of Fish and
23 Wildlife culverts complete in the case area?

24 A I believe so.

25 Q Is the inventory for state parks culverts complete?

1 A Not to my knowledge.

2 Q Has any complete inventory of non state culverts been done,
3 to your knowledge?

4 A No.

5 Q I've just put up on the screen what has been admitted as
6 Exhibit AT-008-19.

7 Mr. Benson, have you had an opportunity to review that
8 exhibit?

9 A Yes, I have.

10 Q It appears to me that there are two parts on the exhibit, one
11 showing some numbers for DFW/DOT culverts and the other showing
12 some numbers for DNR culverts.

13 Do you know anything about the DNR numbers?

14 A I don't work the DNR numbers.

15 Q Do you work with the DFW/DOT numbers?

16 A Yes, I do.

17 Q Let's focus on them. I believe Mr. Waldo testified that he
18 got those from the FPDSI.

19 Is that true, as far as you know?

20 A Yes.

21 Q Have you checked Mr. Waldo's work?

22 A I have.

23 Q As far as you can tell, did Mr. Waldo accurately extract the
24 habitat numbers from the FPDSI when he created the DFW/DOT part
25 of Exhibit AT-008-19?

1 A Yes. I believe it's a reasonable summary of the numbers.

2 Q Are the habitat numbers that Mr. Waldo extracted all based on
3 field-verified data?

4 A No. Some portion of these are not field verified.

5 Q Does it make a difference whether some are field verified and
6 some are not?

7 A Well, I would think the field-verified numbers would be more
8 accurate than the non field-verified numbers.

9 Q For the habitat length data that is contained in the FPDSI,
10 is there any adjustment made for the quality of the habitat?

11 A No. Those numbers are just direct measurements.

12 Q For the habitat area data that is contained in the FPDSI, is
13 there any adjustment made for the quality of the habitat?

14 A Yes, there is.

15 Q Looking at the exhibit on the screen, and again the DFW/DOT
16 numbers, if you multiplied the habitat areas in Exhibit AT-008-19
17 times a species-specific fish production coefficient, would you
18 get an accurate prediction of how many fish could be produced
19 from that habitat?

20 MS. RASMUSSEN: Objection, your Honor. This was ruled
21 to be inadmissible by your motion in limine, the question of
22 Mr. Benson, on a previously eliminated portion of Mr. Waldo's
23 testimony that's not admissible.

24 THE COURT: How is it relevant, I guess, Ms. Woods?

25 MS. WOODS: The Court has admitted a revised portion of

1 Mr. Rawson's declaration that has some ranges for species
2 production coefficients.

3 MS. RASMUSSEN: Mr. Benson is not a rebuttal testimony
4 designated for Mr. Rawson. He's designated specifically to deal
5 with Mr. Waldo's Table 1. And specifically, he can respond to
6 the habitat length. I believe that's what he said he was going
7 to do at his deposition. There's nothing here about Mr. Rawson's
8 numbers or any production coefficients.

9 THE COURT: The objection will be sustained.

10 By Ms. Woods:

11 Q Mr. Benson, have you reviewed Tyson Waldo's declaration that
12 was submitted in this case?

13 A Yes, I have.

14 Q As far as you can recall, did Mr. Waldo testify that he used
15 324 sites from the FPDSI to generate the rearing habitat numbers
16 in Exhibit AT-008-19?

17 A That was the number I read in his declaration.

18 Q Were you provided a list of those sites?

19 A I believe I was.

20 Q Did you check the FPDSI to see whether there are non state-
21 owned fish passage barriers in the same watersheds as the site
22 that Tyson Waldo used?

23 A Yes, I did.

24 Q What did you find? And I put --

25 MS. RASMUSSEN: I'm only going to ask that Ms. Woods

1 identify this. It is not a previously identified exhibit. She
2 should ask Mr. Benson some questions to lay a foundation.

3 THE COURT: Does this have an exhibit number?

4 MS. WOODS: Yes, it does. It's W-133. And
5 Ms. Rasmussen is correct that it has not been admitted.

6 THE COURT: Can you ask some foundational questions?

7 By Ms. Woods:

8 Q Mr. Benson, did you create Exhibit W-133?

9 A Yes, I did.

10 Q How did you do it?

11 A Using the 324 culvert crossings provided by Mr. Waldo, I used
12 a GIS exercise. I plotted those points, overlaid over stream
13 layer and some aerial imagery. I also plotted the fish passage
14 barrier information from the FPDSI database, and then I would, on
15 screen, count the number of barriers upstream of the points
16 provided by Mr. Waldo and the ones downstream as well.

17 And in that process, I created some reference tables
18 referencing Mr. Waldo's points and the upstream barrier points
19 and the downstream barrier points.

20 Q Does Exhibit W-133 summarize the results of some of that work
21 that you did?

22 A Yes, it does.

23 MS. WOODS: I would like to offer Exhibit W-133.

24 THE COURT: Any objection, Ms. Rasmussen?

25 MS. RASMUSSEN: I just want to clarify, because my W-133

1 goes on for ten pages. We've only seen the first page of this.
2 I just want to make sure it's the same as the one I have.

3 THE COURT: How many pages is the exhibit?

4 MS. WOODS: I think it is ten pages.

5 MS. RASMUSSEN: We would have no objection, as long as
6 Ms. Woods clarifies originally Mr. Benson made this for
7 Mr. Waldo's first Table 1, just to clarify and question that it
8 is also a response to his actually admitted Table 1.

9 THE COURT: Ms. Woods, here's what I'll do. We'll go
10 ahead and admit W-133, but Ms. Rasmussen is correct, if there's
11 anything in that ten-page exhibit that is not relevant because of
12 the Court's prior rulings and the exclusion of some of
13 Mr. Waldo's testimony, then it will be disregarded.

14 MS. WOODS: Thank you, your Honor.

15 By Ms. Woods:

16 Q Mr. Benson, we have the first page of Exhibit W-133 on the
17 screen, and I see a couple of tables on that page.

18 Would you please describe what the first table indicates?

19 A Well, it's a summary of the upstream and downstream barriers
20 associated with the state-owned barriers used by Mr. Waldo to
21 generate his Table 1, and this is a case area summary.

22 Q Moving to the second table on the screen, would you please
23 summarize what that depicts?

24 A Well, this would be a WRIA, Water Resource Inventory Area,
25 summary of the same information.

1 Q Now, moving to the second page of W-133, another table,
2 Mr. Benson, would you please summarize what this table depicts?

3 THE COURT: Can you see that entire left-side column?

4 THE WITNESS: I can.

5 Again, this is a case area summary of the data, and it's
6 broken down. It's essentially summarizing the pass -- estimated
7 passability of the culverts using the analysis. The base
8 culverts are those that were provided by Mr. Waldo.

9 Downstream are the state-owned barriers downstream the base
10 culverts, and upstream reflect the barrier culverts -- upstream
11 of the base culverts.

12 MS. WOODS: I'm going to move on to the next slide, and
13 I would also ask Madam Clerk to please hand Mr. Benson the binder
14 that has Exhibit W-133 in it.

15 By Ms. Woods:

16 Q Mr. Benson, if you would please turn to Exhibit 133.

17 A Okay.

18 Q Page 3 up on the screen, would you please describe what the
19 table on Page 3 depicts?

20 A This is a -- essentially a site-specific summary of the
21 upstream and downstream barriers. And they're broken out by
22 their estimated passability. If you were to follow the columns
23 across the top, DS-0 percent would indicate a total barrier
24 downstream of the base culvert. A DS-33 would be a 33 percent
25 estimated passability, etcetera, across the thing.

1 Q I'd like you to, in your notebook, move on and look at the
2 remaining pages in the exhibit and tell me if the remaining pages
3 are all similar to Page 3 displayed on the screen.

4 A Yes, they are.

5 Q Do they display a similar type of information?

6 A Yes, they do.

7 Q Did you prepare any maps that illustrate non state-owned
8 passage barriers upstream and downstream of the culverts that
9 Tyson Waldo used for his analysis?

10 A Yes, I did.

11 MS. WOODS: Your Honor, I will be attempting to lay the
12 foundation for 14 maps. I hope that we can streamline this a
13 little bit.

14 THE COURT: Can you tell me what exhibit number they
15 start with, Counsel?

16 MS. WOODS: 119.

17 By Ms. Woods:

18 Q Mr. Benson, are those maps in the same binder that you've
19 already got, I hope?

20 A Yes.

21 Q I have up on the screen Exhibit W-119. Mr. Benson, did you
22 prepare this exhibit?

23 A Yes, I did.

24 Q What is it?

25 A This is a map of Chico Creek, displaying the upstream and

1 downstream barriers associated with a barrier taken from the list
2 that Mr. Waldo provided.

3 Q What's the significance of the fact that there are non
4 state-owned barriers in the watershed?

5 A Well, it just goes to show that in order to achieve --

6 MS. RASMUSSEN: I'm going to object in that Mr. Benson
7 is here as a FPDSI database expert. He's not here in his
8 scientific capacity as a biologist. He's allowed to create the
9 maps, but originally he was a case-in-chief expert. He was going
10 to be an expert --

11 THE COURT: That's fine, Counsel. The objection is
12 sustained.

13 I know what the significance is, Ms. Woods. Next question.
14 By Ms. Woods:

15 Q Ms. Benson, how did you prepare Exhibit W-119?

16 A It's a relatively straightforward GIS exercise. I selected
17 several data sets. I used the National Agricultural Imagery
18 Program aerial photos as a backdrop. I then overlaid the DNR
19 stream layer, followed by the DOT highway layer and then points
20 from the Fish Passage Diversion Screening Inventory Database.

21 Specifically that was associated with the list provided by
22 Mr. Waldo and the list I generated for the upstream and
23 downstream barriers.

24 MS. WOODS: I would like to offer Exhibit 119 into the
25 record.

1 MS. RASMUSSEN: Your Honor, for this, and all of the
2 remaining maps, we're willing to stipulate that we believe
3 Mr. Benson made them and that he used a similar methodology to
4 make all the maps. Our objection will be to, one, relevance with
5 respect to other people are doing something wrong does not excuse
6 you not fixing your own barriers.

7 And two, when we get to the second one of Chico Creek, you'll
8 see that he has elected to separate passability for the State but
9 not for the other owned barriers. So it just gives sort of a
10 false impression that only -- that the State has passable,
11 partially passable, and totally blocked culverts but that the
12 counties and other owned are all just blocked.

13 And so the second one of each map, we find, have very little
14 probative value in that all the information he had available to
15 him, he did not put onto the map. And then it's sort of
16 cumulative after the first set of examples.

17 THE COURT: And Ms. Rasmussen, I take it that's the same
18 set of objections for all the way down to W-132?

19 MS. RASMUSSEN: Yes, the series of 119 to 132.

20 MS. WOODS: I believe that's correct.

21 MS. RASMUSSEN: And for each of the six examples,
22 there's two types of maps. One is the first one just shows state
23 and non state. Everybody's treated the same. And then the
24 second series will show non state and state partial and state
25 total. We believe that's somewhat misleading not to show the

1 same information for the other owned.

2 And then after the first example, I believe that the point
3 has been made, and it just becomes sort of a cumulative finger
4 pointing that is not relevant to this proceeding.

5 THE COURT: All right. I understand. W-119 will be
6 admitted; in fact, so will all of them down through W-132.

7 Ms. Woods, the arguments being made by the plaintiffs are
8 valid in terms of weight to be given, but they don't deal with
9 admissibility. Whatever probative value they have, I understand
10 they're all different WRIAs. They'll be admitted.

11 MS. WOODS: Thank you, your Honor. So I can move
12 quickly through these slides.

13 By Ms. Woods:

14 Q Mr. Benson, have you prepared any analysis of fish passage --
15 state-owned fish passage barrier culverts in the FPDSI that are
16 not affected by additional barriers in the watershed?

17 A Yes, I have.

18 Q I have put up on the screen Exhibit W-088-C. Do you
19 recognize it?

20 A Yes, I do.

21 Q What is it?

22 A It's a table I prepared for Mr. Barber's declaration
23 indicating state-owned barriers that do not have another barrier,
24 either upstream or downstream.

25 Q How did you prepare it?

1 A This was based on a query directly from the FPDSI database.

2 Q Was it accurate at the time you prepared it, as far as you
3 know?

4 A Yes.

5 Q I would like to move that Exhibit W-088-C be admitted into
6 the record.

7 MS. RASMUSSEN: Your Honor, I'd ask only on this one
8 that you wait until I have an opportunity to cross-examine
9 Mr. Benson about its accuracy, because I found some anomalies,
10 and so I just wanted to examine him further and reserve ruling on
11 that.

12 THE COURT: Fair enough. We'll reserve on 088-C.

13 By Ms. Woods:

14 Q Mr. Benson, has the data in the FPDSI changed since you
15 prepared Exhibit W-088-C?

16 A Yes, it has.

17 Q And when did you prepare the exhibit?

18 A I believe this was March 25th, 2009.

19 Q If you were to prepare an exhibit or list like the one in
20 Exhibit W-088-C today, would it be identical to Exhibit W-088-C?

21 A I don't believe it would.

22 Q Why not?

23 A I think there would probably be 10 to 12 additional culverts
24 added to this list.

25 Q Why is that?

1 A In doing some additional work, GIS work, I found there were
2 some records in the scoping table upon which I relied to do this
3 query that had not been updated properly. Through a GIS
4 exercise, I found more culverts that did not appear to have
5 upstream or downstream barriers associated with them.

6 Q As far as you know, did any drop off the list?

7 A I don't think so.

8 Q I've now got on the screen what has been admitted as Exhibit
9 AT-008-12.

10 Mr. Benson, have you had an opportunity to review this
11 exhibit?

12 A Yes, I have.

13 Q Is the information displayed on it accurate?

14 A I believe the information displayed here is technically
15 correct; however, the number of barrier culverts here I believe
16 actually reflects about 1,155 unique stream crossings, so it's
17 being -- what I believe is being depicted here are the actual
18 numbers of culverts not the actual number of stream crossings.

19 Q And why does that matter?

20 A Well, one, I think it overstates the situation. When I
21 report barrier numbers, I always report the crossings, not the
22 number of culverts that comprise the crossings. In terms of
23 reporting fixes again, they're reported as fixed crossings, not
24 as the individual culverts comprising crossings.

25 THE COURT: Ms. Woods, what exhibit is he discussing

1 right now?

2 MS. WOODS: AT-008-12.

3 THE COURT: Thank you, Counsel.

4 MS. WOODS: I have no further questions at this time.

5 THE COURT: Ms. Rasmussen, cross-examination?

6 CROSS-EXAMINATION

7 By Ms. Rasmussen:

8 Q Good afternoon, Mr. Benson. I believe that we were slotted
9 to do this much earlier, so now we're finally getting it over
10 with. My name is Ms. Rasmussen. I believe you recognize me from
11 prior depositions.

12 A Several.

13 Q Several. Well, you didn't win the most depositions award.

14 A I thought I was close.

15 Q That was Mr. Waldo, your tribal counterpart.

16 I believe Ms. Woods asked you a question about this
17 particular exhibit, and you stated that he put 1,267 culverts,
18 and he accurately wrote that down on the map, right, that it was
19 culverts not sites?

20 A That's correct.

21 Q And that's associated with about how many sites, do you
22 think?

23 A 1,155 I believe is the correct number.

24 Q 1,155 sites, because sometimes there is more than one culvert
25 at a site; is that correct?

1 A That's correct.

2 Q But visually, if you were to put two dots on top of each
3 other, you wouldn't actually see any visual difference in what
4 these two maps look like; is that correct?

5 A That's correct. But I don't know anyone that's going to
6 count the dots. They're going to look at the number and see how
7 many there are there.

8 Q And are you aware that repeatedly in this proceeding,
9 different state witnesses, including Mr. Wagner in his
10 declaration, Exhibit 92, W-92, refers to culverts and not sites,
11 and in fact people have often not been aware of what they were
12 referring to?

13 At least with respect to Mr. Waldo and yourself, you've
14 accurately identified when you used one or the other. But many
15 state witnesses have in fact used the term "culverts" when they
16 meant "sites," and possibly vice versa; is that correct?

17 A That's quite possible.

18 Q So it's more important to get it right, isn't it?

19 A Yes.

20 Q I'm going to go back to W-133. As much as I love this one,
21 and I'd love to leave it up all day, I'm going to switch.

22 This is your response to Mr. Waldo's Table 1; is that
23 correct?

24 A Yes, it is.

25 Q And your point here is that there's a lot of other people who

1 have blocking culverts; is that correct?

2 A Yes.

3 Q But your point isn't that the State doesn't have to fix
4 theirs; it's just that there's a lot of other work that has to be
5 done, right?

6 A That's correct.

7 Q And in order to achieve the benefit -- say the counties were
8 to come in and really go out and fix that 1,370 barrier culverts,
9 it wouldn't realize its full benefit, right, unless the State
10 fixed their 315?

11 A That's correct.

12 Q And I believe in your Exhibit 88-C, you say there's 42
13 barriers with no other barrier in the watershed. And when I look
14 at 133 and sort of go through, there's a couple of pages past
15 this. I went through the columns of the grand total and looked
16 for zeros, and I found about 77 of them.

17 Would that be my mistake or a change in the data set?

18 A I believe there may have been some qualifiers on the data
19 that were used in the other table. I think there was a minimum
20 of 200 lineal meters of habitat required upstream that would have
21 to be included on that. This table here, that filter is not in
22 place, so some of these that you see here may not have that
23 200 meters of habitat associated with them.

24 Q While we're on this page, I want you to take a look at site
25 102 L 062, where it says there's 140 other culverts in the

1 watershed.

2 That's Little Bear Creek, isn't it, one of the examples that
3 Mr. Tomisser used in opening statements?

4 A I believe that's correct.

5 Q It is kind of an outlier, isn't it?

6 A It's a very high number.

7 Q In fact, it's the only culvert of the 315 that has 81 more
8 sites associated than any other, is that correct? In the
9 ballpark. I'll say I counted.

10 A Can you repeat that, please?

11 Q Little Bear Creek, the example used by Mr. Tomisser in his
12 opening to illustrate his problem, is such an outlier, in fact,
13 doesn't it have about 80 more sites associated than any other
14 culvert in the examples? If you want to verify, you can scroll
15 through -- go ahead and circle that first page where the 140 is.
16 I'll attest to you that I verified that that was in fact the site
17 ID for Little Bear Creek.

18 I don't find anything on the grand total that's anywhere near
19 that particular example that Mr. Tomisser chose to use in his
20 opening. Do you?

21 A No, you don't.

22 Q And in fact, you use this example because Counsel asked you
23 to, right?

24 A That's correct.

25 Q Does Little Bear Creek, to your knowledge, have a high PI or

1 a low PI?

2 A I'm thinking it has a pretty high PI.

3 Q And that's because it has, I'll attest to say, about 18 miles
4 of habitat that's being blocked; is that correct?

5 A I don't recall the exact number, no.

6 Q Okay. So it has a high PI, which means that the State has
7 determined, based on its priority index, that it's actually a
8 good project; is that correct?

9 A I don't know that it was determined that it was a good
10 project. That comes as part of the scoping process.

11 Q Okay. Well, I can go to one that Mr. Barber -- from your
12 examples that Mr. Barber testified was a good project, which was
13 Chico Creek, and that's W-119 and 120. And here you have it as
14 an example of there being other barriers of the watershed.

15 And you heard Mr. Barber testify, correct?

16 A Yes.

17 Q And he said that despite this, it is a pretty good project.
18 In fact, it's a great project.

19 A I did hear him testify to that.

20 Q Do you disagree with that?

21 A I have no basis to agree or disagree.

22 Q But wouldn't looking at the map not tell you that story if
23 you were sitting in your chambers by yourself looking at the map,
24 you wouldn't necessarily know the full story of that project
25 would be that it was a great project with lots of miles and lots

1 of species that could be helped?

2 You're not going to give me anything, are you? Okay. I'll
3 take that. It's okay. I won't push any further.

4 I will sort of rewind to the beginning a little bit. Do you
5 work with someone named Eva Wilder?

6 A Yes.

7 Q And what does she do?

8 A Well, she works in the maps section, and she does -- to be
9 honest with you, I don't know what all of her jobs duties are,
10 but she does utilize the database quite a bit, and that's how I
11 interact with her.

12 Q Okay. And do you remember there being prior testimony about
13 the SPI from Mr. Barber?

14 A Here?

15 Q Yes.

16 A I don't recall it.

17 Q Do you know what the SPI is?

18 A Yes, I do.

19 Q And what is it?

20 A It is a surrogate PI. It's kind of a place holder value for
21 a real PI.

22 Q It's an analysis done to determine a surrogate priority
23 number for the remainder of the culvert -- blocking culverts for
24 which there's no actual habitat assessment; is that correct?

25 A Well, I think it was calculated for the purpose of

1 prioritizing how to do their habitat assessment work.

2 Q But it's used for other purposes, isn't it?

3 A I believe it has been.

4 Q In fact, you use it in your annual reports, don't you?

5 A I do not write or participate in the annual reports.

6 Q Have you ever participated in the annual reports?

7 A Maybe back in the late 90s.

8 Q Go ahead and move to Page 4. This has been previously
9 admitted as AT-72, for the record.

10 On Page 4 on the right-hand column, there's a little asterisk
11 that goes up to the calculation as the miles restored by opening
12 up fish-blocking culverts. And what does it say in that corner?

13 MS. WOODS: Objection, your Honor. It's beyond the
14 scope of Mr. Benson's direct testimony.

15 MS. RASMUSSEN: I can respond to that. Mr. Benson is
16 the FPDSI records custodian. We have a stipulation in the
17 pretrial order that we can lay the foundation through the State's
18 witnesses if we need to. And he's testified that he uses GIS and
19 other types of techniques to supplement his information in the
20 SPI, and he's used some examples of that. And I'm trying to
21 establish that this particular example shows that in their annual
22 report, they use a GIS-based SPI priority index number.

23 And he works with Ms. Wilder, and he has previously had
24 knowledge that this was likely how she did it.

25 THE COURT: All right. I'll overrule the objection.

1 I'll let you explore it more.

2 THE WITNESS: Where were we?

3 By Ms. Rasmussen:

4 Q Mr. Benson, if the end report says the amount of habitat
5 blocked by barrier was determined by habitat surveys or estimated
6 using Geographic Information System, GIS, which you have referred
7 to today often, software for sites that were lacking habitat
8 surveys, would that mean that this number was derived in part by
9 using the SPI?

10 A It may be the same work. Again, I did not participate in it.
11 I'm not the only person that does the GIS work. It's quite
12 possible that Eva Wilder did the GIS work and that the SPI came
13 out of that.

14 Q Do you know of any other way that the State would have been
15 able to measure these miles known as restored, given that they
16 don't have a PI for all the culverts that they fixed and don't
17 have a habitat measure?

18 A Well, I imagine they -- they used the GIS exercise. It could
19 be multiple GIS exercises going on.

20 Q So there's something I've never heard of that could have
21 happened, but most likely it was Ms. Wilder using the SPI, wasn't
22 it?

23 A Most likely. I can't say for absolute certain.

24 Q Can you turn to Page 87, please. The annual report is put
25 together every year. And used in the annual report is records of

1 the progress that folks are making with respect to fixing barrier
2 culverts, right -- or in particular, DOT is making; is that
3 correct?

4 A I believe so, yeah. Again, I don't participate in the
5 writing of the annual report.

6 Q But are you aware generally the information from the FPDSI is
7 used for this report?

8 A I'm aware the information is used.

9 Q Okay. So if you look at the table on Page 87, are these the
10 kind of site identifiers that you find in the database: site ID,
11 road, mile post, system name, WRIA, percentage fish passable?
12 And at the end, it goes to lineal gain, and sometimes there's a
13 measure and sometimes there's not.

14 A Yes. This would all come out of the database.

15 Q And this lineal gain is measured irrespective of any other
16 owned culvert which might be on the watershed; is that correct?
17 The State doesn't measure from the culvert they opened up to the
18 next blocking culvert; they measure from the culvert to the top
19 watershed, is that correct, in terms of lineal gain?

20 A When we report potential lineal gain, that is correct. I'm
21 not sure if in this report they're actually reporting the
22 incremental gain or the potential.

23 Q Can you pull up AT-071, Page 6? And in this 2008 annual
24 report, AT-71, it does the same thing. It refers to 782 linear
25 kilometers, 486 miles, once blocked that have been restored; is

1 that correct?

2 A I have not read this report.

3 Q So you have no knowledge about the amount of miles having
4 been calculated as being -- and being treated as restored or
5 opened up in the report by the department?

6 A I have not participated in the calculations recorded in this
7 report.

8 Q Have you ever done a calculation that referred to miles that
9 could be potentially opened up? And, again, without taking into
10 account other owned barriers, just counting the miles.

11 A If I did, it was many years ago and not related to this
12 litigation.

13 Q That doesn't bother me if it's not related to the litigation.
14 Would seeing the salmon recovery balance scorecard detail refresh
15 your recollection on whether you'd ever done such an analysis?

16 A That was the one that was coming to mind.

17 Q So do you want to change your answer about whether or not you
18 have done it, or would you like to see the document?

19 A You can put the document up if you like.

20 Q I'm asking if you need the document to refresh your
21 recollection or not.

22 A I don't need it.

23 Q So you have done such an analysis?

24 A Actually, that document talks about how to do it. I don't
25 really recall that we ever followed through and did it. We

1 talked about concepts on how to do it, and that was a long time
2 ago.

3 Q That's okay. That's why I brought it.

4 MS. RASMUSSEN: May I approach, your Honor?

5 THE COURT: He asked you to put it on the --

6 MS. RASMUSSEN: Oh, okay. I don't need to get it marked
7 to use it to refresh his recollection. Okay. I'm going to go
8 ahead and put it up here.

9 By Ms. Rasmussen:

10 Q First of all, do you recognize that?

11 A Not just as you have it there. I recall working on this
12 process.

13 Q I'm going to turn to Page 7 of the document. I'm trying to
14 get the right part there. It talks of cumulative miles of high-
15 quality fish habitat opened up. It has your name on it as the
16 data collector.

17 A I see that.

18 Q Does that refresh your recollection about whether you did
19 that kind of analysis?

20 A Again, I think this was being put forth as processes to how
21 you would do it. I don't ever really recall doing the analysis
22 or following up with the score card. It was one of those things
23 that kind of came and went.

24 Q Did you ever work on a document with Mr. Sekulich where you
25 described road crossings blocking 3,000 miles of spawning and

1 rearing habitat in Washington? Did you provide that 3,000 miles
2 to Mr. Sekulich?

3 A That's pretty vague. I think I need more information here.

4 Q I'll go ahead and put up AT-156.

5 Did you work with Mr. Sekulich in 1997?

6 A Yes, I did.

7 Q I believe we've seen this document before. Do you recognize
8 it?

9 A I do not.

10 Q So you don't recall whether you provided that analysis in
11 Paragraph 3 that says, "In fact, road crossings block about
12 3,000 miles of spawning and rearing areas in Washington"?

13 A I have no recollection of that.

14 Q Okay. Have you ever compiled data and organized it that
15 showed the percentage of culverts that would need to be fixed in
16 order to get a 90 percent habitat benefit?

17 A Yes.

18 Q And you created a spreadsheet with this information; is that
19 correct?

20 A Yes.

21 Q Can you put up 333 -- 323?

22 Was this information outlined in the spreadsheet called
23 "WSDOT CA Barriers Habitat 311-090HW Update"?

24 MS. WOODS: Your Honor, this material was prepared in
25 connection with Dave Smelser's testimony, which has been

1 excluded, and we are objecting to questions about these documents
2 that were provided to Mr. Smelser because it relates to testimony
3 that was excluded. These documents should be excluded as well.

4 MS. RASMUSSEN: Your Honor, may I respond?

5 THE COURT: Which exhibit are you looking at?

6 MS. RASMUSSEN: AT-323.

7 THE COURT: All right.

8 MS. RASMUSSEN: So I understand that the State's
9 argument is a little bit that this is fruit of the poisonous tree
10 of Mr. Smelser. In fact, it's sort of the reverse. Mr. Benson
11 created this spreadsheet, not Mr. Smelser. And in the beginning
12 of this year, we promulgated an interrogatory asking for all
13 measurements and information that they had, and this was the
14 cause of our dispute in the motion in limine. We were
15 complaining about not having obtained timely information.

16 And then the July 20th discovery cutoff came, and we still
17 didn't have the information. We knew they had compiled habitat
18 gain information using this surrogate PI, but we didn't have it.
19 And we obviously were interested in proposing to the Court a
20 potential solution, where we'd ask for only 90 percent of the
21 habitat to be fixed. And in order to have some idea of what that
22 was, we needed this surrogate PI measure.

23 And so then on July 21st we sent a letter to counsel asking
24 again -- pointing out that they used the SPI in their 2009, 2008,
25 2007, 2006 progress reports in order to get this potential miles

1 gain because they didn't have PIs for all those culverts they
2 were fixing, so they were obviously using a surrogate.

3 In response, Ms. Woods responds, Well, we're going to provide
4 it with Mr. Smelser on July 21st. Ms. Woods says, We expect to
5 provide it with Dave Smelser's rebuttal file on the 27th. And
6 again I asked for it again on the July 22nd deposition of
7 Mr. Benson when I learned that he'd worked on this information.

8 The problem here is that it does not become the fruit of the
9 poisonous tree that's Mr. Smelser's excluded testimony by the
10 fact -- by virtue of the fact that Mr. Benson created it in March
11 and refused to give it to us in response to the discovery
12 response.

13 THE COURT: All right. If I understand this correctly,
14 this was created in March of '09, right?

15 MS. RASMUSSEN: Yes. And then it was updated. I don't
16 know the exact date that he updated it.

17 THE COURT: And it purports to show this witness's
18 efforts at calculating which barriers would need to be fixed in
19 order to gain a 90 percent benefit in habitat?

20 MS. RASMUSSEN: Yes.

21 THE COURT: The objection will be overruled. You may
22 inquire.

23 By Ms. Rasmussen:

24 Q Do you recognize the spreadsheet? Is it from the source
25 datasheet?

1 A I'm afraid it's too small for me to read.

2 MS. RASMUSSEN: If it would help the witness, we have
3 actually brought the active sheets in anticipation that he might
4 not be able to verify it with the PDF.

5 By Ms. Rasmussen:

6 Q I should ask you, can you PDF -- or turn into a PDF an Excel
7 spreadsheet? Is that possible?

8 A I'm not absolutely sure. I don't do it.

9 MS. RASMUSSEN: Well, I'll attest to you that what we
10 did is we obtained this worksheet actually from Ms. Woods, and I
11 have the screen shot of the e-mails which I obtained for the
12 worksheet if I need to produce it. We turned it into a PDF
13 because we felt that an Excel spreadsheet as an exhibit might be
14 somewhat difficult for the Court. But we have it with us should
15 the witness need it to verify the information.

16 THE COURT: If you can show him that. Because I can't
17 see what's on the screen, and I'm sure he can't see it either.

18 MS. RASMUSSEN: Would you like me to have the Court's
19 copy marked, your Honor?

20 THE COURT: No, that's all right. I just want him to be
21 able to identify it.

22 By Ms. Rasmussen:

23 Q I will attest to you that this is the document we received
24 from Ms. Woods in response to a subpoena, WS/DOT CA barrier
25 77311090HWF site. And the anadromous all PI tab is Exhibit 323.

1 And the anadromous formal PI worksheet is 322 -- or tab, I should
2 say, which is to the left of this one.

3 Let's start with 323. Do you recognize this?

4 A Yes.

5 Q Would you like a moment to compare it to the other worksheet
6 so that can you answer whether or not they're the same?

7 A How would I do that?

8 MS. RASMUSSEN: Madam Clerk, can you hand the witness
9 Exhibit 323 in its paper form?

10 By Ms. Rasmussen:

11 Q Did you bring your glasses today?

12 A I brought both sets, yes.

13 Q I should have bought some in anticipation that you might tell
14 me that you can't read any of this.

15 A What number was it again?

16 Q 323.

17 A I would agree that these are the same.

18 MS. RASMUSSEN: Your Honor, I would move at this time to
19 admit Exhibits 323 and 324.

20 THE COURT: Any other objections, Ms. Woods?

21 MS. WOODS: I don't believe it's been established that
22 Mr. Benson maintains this type of information as part of his
23 ordinary job duties, so I would object on that basis.

24 MS. RASMUSSEN: Your Honor, my response to this is that
25 --

1 THE COURT: That's fine, Ms. Rasmussen.

2 I'm going admit AT-323 and AT-324.

3 By Ms. Rasmussen:

4 Q I guess I'll have to use this one.

5 You created this spreadsheet; is that correct?

6 A Yes, I did.

7 Q And if you wanted to know -- I attested to you that the
8 tribes have proposed in the pretrial order a resolution whereby
9 they're asking DOT to fix 90 percent of the habitat.

10 Would there be a way to find out, based on this analysis,
11 what 90 percent of the habitat -- how many culverts that would
12 mean?

13 A Which habitat metric are you referring to?

14 Q Well, if I understand correctly, this worksheet has "habitat
15 gain" on it. It has "lineal gain" in Column M.

16 So you have "lineal gain" in column M, and that lineal gain
17 is associated with fixing certain culverts. And have you another
18 column that's the cumulative percentage of habitat? Is that the
19 one in Column O?

20 A "Cumulative percentage of lineal gain."

21 Q "Cumulative percentage of lineal gain." Well, how would you
22 find out 90 percent? Since it is your spreadsheet, I won't
23 embarrass myself by doing it for you.

24 A Well, you would go down the column until you reach the
25 90 percent value. That would correspond with a line that would

1 give you the number of culverts associated with that value.

2 Q I believe we've found the line. Can you scroll over and tell
3 me how many culverts that would be?

4 Sorry, your Honor, it's a little different than the
5 worksheet.

6 Let's go back to 323. Is there a way to find out what line
7 culvert this is? When we printed it out, it did a numerical
8 value for which culvert it was.

9 A I think you're corresponding to a value of 577 there.

10 Q Okay. So the sort number is that it would take, according to
11 this worksheet, 577 of the 807 culverts with over 200 meters of
12 habitat to get 90 percent of the habitat gain; is that correct?

13 A Based on the information that's in here. Again, you're
14 mixing estimated with real data here, so you can't say for sure
15 that that is exactly what you're going to end up with.

16 Q And when you say "estimated," you're referring to the SPI,
17 not the EDT analysis which you referred to before as the non
18 field verified?

19 A EDT is also an estimate.

20 Q Okay. And you use EDT frequently, correct?

21 A We don't use it that often anymore.

22 Q Does it amount to a large percent of the data or just a small
23 percentage?

24 A I would say a smaller percent.

25 Q So your caveat here is that the SPI is based on this GIS

1 exercise, so that it's not absolutely 577 exactly, which would
2 yield 90 percent habitat gain; is that correct?

3 A That's correct.

4 Q And in order to know that for sure, you'd probably have to do
5 these habitat assessments that the tribes are interested in
6 having the department complete; is that correct?

7 A That's correct.

8 Q All right. But this would give you at least some sort of
9 idea that the remedy that the tribes are seeking isn't all 807 of
10 the culverts, should the department complete habitat surveys.

11 A That's correct.

12 Q And that would impact the total number that would need to be
13 fixed at an accelerated schedule; is that correct?

14 A I believe so.

15 Q So unfortunately for me, I have another spreadsheet I'd like
16 to ask you about, 168.

17 Do you know what the anadromous all PI 92 worksheet might be?

18 A Yes, I do.

19 Q Do you recognize this?

20 A I do.

21 Q And did you do this?

22 A Yes, I did.

23 Q And what does it represent?

24 A It's essentially the same as the previous spreadsheet;
25 however -- well, it's not essentially the same. It's the same

1 site, same order. It doesn't have the calculated fields, the
2 percentage fields, the cumulative gains, etcetera, but there are
3 habitat values that have been reinserted in this spreadsheet that
4 were not included in the other spreadsheet.

5 If you look at the lines that have been grayed out, those
6 represent barriers that are upstream of another barrier. And in
7 the previous spreadsheet, we zeroed out the potential habitat
8 gain values so that that habitat was not double counted in the
9 total. This spreadsheet was provided with those values put back
10 in so that Mr. Smelser could run his analysis in an alternative
11 way.

12 MS. RASMUSSEN: I'm going to ask to have AT-168 also
13 admitted.

14 THE COURT: Any objection?

15 MS. WOODS: We have the same objections, your Honor, as
16 to the prior spreadsheets.

17 THE COURT: Thank you, Ms. Woods.

18 AT-168 will be admitted. Ms. Rasmussen, I'm sorry.

19 I didn't understand, Mr. Benson, the last thing you said
20 about this exhibit. Can you go through that with me one more
21 time, please, what the difference is between this one and the
22 other one?

23 THE WITNESS: This spreadsheet does not contain the
24 "cumulative lineal gain," "sum lineal gain," "sum of spawning
25 area," "cumulative spawning area," "sum of rearing area," and

1 "cumulative rearing area" columns. The lines that are grayed
2 out, the rows, if you go under the "potential lineal gain,"
3 "potential spawning area," and the "potential rearing area," you
4 will see that there are values in each row.

5 In the previous spreadsheet, many of those values were zeroed
6 out in those gray lines. In creating this spreadsheet, we were
7 grouping culverts together that are on the same stream. So when
8 we say "potential," we're talking about all the habitat from the
9 lower most barrier to the upper end of the anadromous fish use.

10 So if there's barriers upstream, we included the habitat for
11 all of those and we totaled it up, and it's in the cumulative
12 columns. We would double count, triple count the habitat.
13 That's why it was zeroed out in the first spreadsheet. Those
14 numbers were put back into the spreadsheet so that Mr. Smelser
15 could run an analysis in a different way than what we had
16 originally laid out.

17 THE COURT: Thank you. You may inquire.

18 MS. RASMUSSEN: I believe that I misspoke earlier.
19 Counsel just reminded me.

20 I asked to have 323 and 324 admitted as part of the OHW
21 3/11/09 worksheet. What I should have said was 322 and 323.
22 Those were the two that were part of the worksheet. And I have
23 yet to ask Mr. Benson about 324, which is the last worksheet,
24 should anybody be worried.

25 THE COURT: All right. So we're referring to AT-323 and

1 AT-322?

2 MS. RASMUSSEN: Yes. Those are the two that should have
3 been admitted rather than 323 and 324. I misspoke. I got the
4 two next to each other wrong. And I have yet to ask Mr. Benson
5 about 324.

6 THE COURT: We'll admit AT-322, and you may inquire
7 about AT-324.

8 By Ms. Rasmussen:

9 Q Is this the same worksheet as AT-168, Mr. Benson?

10 A Is AT-168 in this book?

11 MS. RASMUSSEN: Madam Clerk, could you give him the book
12 with AT-168?

13 The reason I'm asking him to do this, your Honor, is we have
14 different source documents.

15 THE WITNESS: I think these are the same spreadsheets.

16 By Ms. Rasmussen:

17 Q Remember when I asked you earlier if one of the examples you
18 used for Mr. Waldo's work was a very high PI number and I pointed
19 to Little Bear Creek? Is Little Bear Creek on here?

20 A Yes, it is.

21 Q What's its PI number?

22 A 52.7.

23 Q What did you say? Sorry.

24 A 52.7.

25 Q Is that a relatively high PI for your priority index?

1 A I believe that's a pretty high PI.

2 Q And you don't know why it has such a high PI?

3 A Well, there are many factors that go into the PI. It could
4 be the amount of habitat, the potential habitat gain. It could
5 be the number of species that stand to benefit.

6 Q If I wanted to know the potential lineal gain from Little
7 Bear Creek, what would I do?

8 A Potential lineal gain?

9 Q Yeah.

10 A Well, I would just follow the spreadsheet over to right there
11 where it says "potential lineal gain."

12 Q And you don't recall if that's somewhere near 18 miles of
13 habitat?

14 A I'd have to do the math. I don't report my stuff in miles
15 typically.

16 Q But the examples -- suffice it to say that the examples of
17 the maps you used, and I don't mean to beat a dead horse, were
18 not randomly selected; they were selected because they had a high
19 number of barriers, right? It wasn't a statistically valid
20 sampling technique?

21 A It was -- yeah. The sites were not randomly selected.

22 Q The purpose was to drag out a bunch of examples where a lot
23 of people were shirking; isn't that correct?

24 MS. WOODS: Objection as to form, your Honor.

25 MS. RASMUSSEN: Sorry. I've been reading "Horton Hears

1 a Who."

2 By Ms. Rasmussen:

3 Q To draw a bunch of examples where a lot of people were also
4 not fixing their culverts; is that correct? That they were
5 weren't statistically valid samplings; they were specifically
6 chosen for their large number of barrier culverts associated with
7 them. Your purpose was not to show that they were bad projects
8 but to just show the fact that there were other barriers; is that
9 correct?

10 A The selection -- you have three criteria. Number one, that
11 they were spread out over the WRIAs; two, they had high PIs; and
12 three, yes, there were a large number of other barriers in the
13 system.

14 Q But you wouldn't want to be misleading the Court in implying
15 that these projects were not good projects, right?

16 A I did not select them based on whether or not they were good
17 projects.

18 MS. RASMUSSEN: Can you go ahead and put up AT-235,
19 please?

20 THE COURT: Counsel, before we leave AT-324, he did say
21 it was the same as AT-168?

22 MS. RASMUSSEN: Yes. I believe that if it's the same as
23 AT-168, then we do not need it twice.

24 THE COURT: Madam Clerk, AT-324 is not admitted. Thank
25 you.

1 By Ms. Rasmussen:

2 Q Do you recognize this, Mr. Benson? I'm showing you what has
3 been marked as AT-235. This has not been admitted.

4 Do you recognize it?

5 A Yeah. I believe you showed this to me during my last
6 deposition.

7 Q Is this the kind of chart you could make using the
8 information supplied from the database that we discussed?

9 A Can you enlarge it, please? I can't see it.

10 If I read this correctly, it says it's a statewide estimate.
11 That would exceed the data that's available on the spreadsheets.

12 Q I'm going to go back to something you said about Mr. Waldo's
13 table.

14 MS. RASMUSSEN: Could you put up his Table 008-19? Oh,
15 we don't have it. That's right. Just a second. I have a copy.

16 By Ms. Rasmussen:

17 Q I've put up what's AT-008-19. I will attest to you that it's
18 my copy, and it's got handwriting on it.

19 This is the table that you looked at earlier with Ms. Woods;
20 is that correct?

21 A That's correct.

22 Q And you testified that one problem you have with it was that
23 he had used non field-verified data. And this is -- you're
24 referring to the expanded threshold determination analysis; is
25 that correct?

1 A That's correct.

2 Q And do you know whether -- and I just want to be clear. This
3 portion of the data that you use is only about 6 to 9 percent of
4 the data, or possibly less; is that correct? It's a very small
5 portion of the data that he used?

6 A Can you be a little more specific, please?

7 Q You know, when you made the critique that Mr. Waldo used non
8 field-verified data, do you know how much of the data was non
9 field verified?

10 A I think it accounts for approximately 10 percent of the
11 measures recorded here.

12 Q And other than that, Mr. Waldo, you had no critique of the
13 methodology he used?

14 A No, I did not.

15 MS. RASMUSSEN: I'm making sure I haven't forgotten any
16 of the documents my colleagues asked me to ask Mr. Benson about.
17 Otherwise, I'll hear about it later.

18 I believe I have no further questions for Mr. Benson. Thank
19 you.

20 THE COURT: Counsel, we had reserved on W-088-C until
21 after your cross. Do you still have any objections to it?

22 MS. RASMUSSEN: Just that one of the big problems with
23 this particular exhibit, and I explored this with Mr. Barber, is
24 the exhibit itself does not contain the limiting basis of the
25 data. He used 398 of the total sites, and on the exhibit

1 itself --

2 Can you put up 88-C? On the top title, it just says, "WSDOT
3 and WDFW barrier culverts unaffected by additional upstream or
4 downstream barriers." These culverts represent barriers to
5 anadromous salmon that have over 200 meters of potential habitat
6 gain. It does not contain the limitation that it's only actually
7 a quarter of the data. It accounts for a quarter of the data,
8 not for all of them.

9 And my concern is that if someone takes this exhibit not in
10 conjunction with Mr. Barber's declaration that contains the
11 limit, it's completely possible that they would be misled. And
12 sometimes this happens, and they say there's only 54 barriers
13 with no other barriers in the watershed. And we've seen in the
14 most recent exhibit, W-133, that there's 77 on that list, and
15 Mr. Benson testified it's because the database is a moving thing.

16 So this one is no longer accurate, and he has testified that
17 it isn't, so that would be my objection.

18 THE COURT: Thank you.

19 That objection will be overruled. W-088-C is admitted.

20 MS. RASMUSSEN: So I still have no further questions.

21 THE COURT: Thank you, Ms. Rasmussen.

22 Ms. Woods, any redirect of this witness?

23 MS. WOODS: Just a few questions, your Honor.

24 I've asked to have AT-168 put back up on the screen.

25 REDIRECT EXAMINATION

1 By Ms. Woods:

2 Q All right. Mr. Benson, you were asked some questions about
3 AT-168. Do the culverts listed on AT-168 include culverts that
4 block less than 200 meters of habitat?

5 A I don't believe so.

6 Q You were asked some questions about one of the sites on
7 AT-168 as well as the spreadsheet that appears to be identical to
8 it, and that is - these numbers are teeny, I'm sorry - the fourth
9 site listed on the spreadsheet, Little Bear Creek. And I believe
10 you testified that it has a high PI and explained how you would
11 find out how much potential lineal gain that culvert would have
12 if it were fixed.

13 Can you tell from the spreadsheet how much lineal gain you
14 would actually achieve by fixing the culvert?

15 A No. This value represents the potential. You would need to
16 know what the next upstream barrier is and what the distance
17 between the two is to account for that.

18 MS. WOODS: Your Honor, before we dismiss this witness,
19 I would like to make an offer of proof regarding a question where
20 an objection was sustained.

21 THE COURT: Go ahead.

22 MS. WOODS: I put back up on the screen Exhibit
23 AT-008-19. And the question that I asked where the objection was
24 sustained was, if you multiply the habitat areas in Exhibit
25 AT-008-19 times a species-specific fish production coefficient,

1 would you get an accurate prediction of how many fish could be
2 produced from that habitat?

3 You may go ahead and answer, please.

4 THE WITNESS: Oh, I may? I wasn't aware of that.

5 No, I don't believe you would. The numbers portrayed here
6 are summary numbers taken from the database. They essentially
7 reflect the distance -- the potential gain between target barrier
8 and the upstream most extent of anadromous use. To get into
9 species-specific production values, you would need to know which
10 portion of that habitat is actually used by any given species.

11 Different species of salmon are distributed throughout the
12 streams. They're essentially partitioned into different gradient
13 reaches. So if you have a stream that has a whole variety
14 that -- you know, those from low gradient to high gradient, some
15 species are going to be found in the lower end, some in the
16 middle, some in the upper end. You really need to be able to
17 break out which part of those streams those species are using in
18 order to get you any kind of fish production value.

19 MS. WOODS: Thank you. I have no further questions.

20 THE COURT: Mr. Benson, you may step down. Thank you.

21 Ms. Woods, we have about a half hour left. Do you have a
22 little, short witness?

23 Mr. Tomisser?

24 MR. TOMISSER: We have a big, tall witness who I suspect
25 will not be finished, if the Court has a hard deadline.

1 THE COURT: Do you want to get started today, though?
2 We have about half an hour left, so --

3 MR. TOMISSER: Yeah, we can. He's here.

4 THE COURT: My clerk has convinced me I need to attend
5 to this other detail. We will give you a half hour off on our
6 weekend here. Any problem?

7 Everybody back nine o'clock Monday morning. Have a great
8 weekend. We will see you all then.

9 (Adjourned for the day.

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CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning